FILED

No. 961562 APR 2 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

SAMANTHA SISTRUNK,

Petitioner,

vs.

CITY OF STRONGSVILLE, OHIO AND THE BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL R. WARREN
Counsel of Record
BRIAN J. LAMB
NICOLLE M. CLESSURAS
KITTIE D. WARSHAWSKY
THOMPSON HINE & FLORY LLP
Attorneys for Petitioner
3900 Key Center
127 Public Square
Cleveland, OH 44114-1216
(216) 566-5500

83 pp

QUESTION PRESENTED FOR REVIEW

May the President's private campaign committee, acting pursuant to municipal authority, impose a viewpoint-based restraint on the peaceful expressive activity of a spectator attending a political rally in a public park?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES CITED iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

i. There Is An Urgent Need To Resolve Confusion In The Lower Courts Regarding The Effect Of Hurley On The First Amendment Rights Of Spectators In Traditional Public Forums. 7

ii. The Sixth Circuit Erroneously Relied On Hurley To Silence A Spectator's Expression Of Dissent In A Public Forum 11

a. As A Member Of The Audience, Petitioner Did Not Seek To Be Included In, Or To Alter, The Committee's Message 12

b. The Competing First Amendment Rights Of The Parties Must Be Balanced Against Each Other 16

iii. The Practice Of Excluding Spectators From Traditional Public Forums Based On Viewpoint Is Widespread And Substantially Certain To Recur 18

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 14

Capitol Square Rev. & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) 14

Cohen v. California, 403 U.S. 15 (1971) 15

Connick v. Myers, 461 U.S. 138 (1983) 8

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) 17

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) 17

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 11

Elrod v. Burns, 427 U.S. 347 (1976) 16, 17

Evans v. Newton, 382 U.S. 296 (1966) 8, 11

Hague v. Committee For Industrial Organization, 307 U.S. 496 (1939) 8

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) . . . 6, 7, 9, 10, 11, 12, 13, 14, 15, 16

Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997) 9, 10, 11, 15, 19

Mills v. Alabama, 384 U.S. 214 (1966) 8

Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983) 8

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 1

Texas v. Johnson, 491 U.S. 397 (1989) 15

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 14

U.S. Postal Service v. Council of Greensburgh Civic Ass'ns, 453 U.S. 114 (1981) 8

Williams v. Rhodes, 393 U.S. 23 (1968) 15

CONSTITUTION, STATUTES, AND RULES

U.S. CONST. amend. I 2

U.S. CONST. amend. XIV 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 5

28 U.S.C. § 1367 5

42 U.S.C. § 1983 . . . . . 2, 5

APPENDIX

Appendix A.
Sixth Circuit Opinion, Filed 10/29/96 . . . . . A-1

Appendix B.
District Court Order Of Dismissal,
Filed 6/28/94 . . . . . B-1

Appendix C.
District Court Order Vacating Order
Of Dismissal, Filed 7/8/94 . . . . . C-1

Appendix D.
District Court Memorandum And Order
Of Dismissal, Filed 8/19/94 . . . . . D-1

Appendix E.
District Court Memorandum And Order
Granting Leave To File Amended Complaint,
Filed 10/12/94 . . . . . E-1

Appendix F.
District Court Memorandum And Order
Of Dismissal, Filed 12/15/94 . . . . . F-1

Appendix G.
Sixth Circuit Order Denying Petition
For Rehearing, Filed 1/2/97 . . . . . G-1

Appendix H.
Sixth Circuit Mandate, Filed 1/10/97 . . . . . H-1

PETITION FOR WRIT OF CERTIORARI

Petitioner Samantha Sistrunk respectfully petitions for a writ of certiorari to review the judgment and opinion entered by the United States Court of Appeals for the Sixth Circuit on October 29, 1996.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit in Sistrunk v. City of Strongsville, No. 95-3067 (October 29, 1996), is reported at 99 F.3d 194, and is reproduced in the Appendix filed herewith at Appendix A ("App. A"). The five unreported opinions and orders of the United States District Court for the Northern District of Ohio, Sistrunk v. City of Strongsville, No. 1:94CV0764, are reproduced herewith in the Appendix at B, C, D, E, and F, respectively ("App. B, C, D, E, and F").

JURISDICTION

On October 29, 1996, the United States Court of Appeals for the Sixth Circuit affirmed the Judgment and Order of the United States District Court for the Northern District of Ohio, dated December 15, 1994. A Petition for Rehearing (Suggestion of En Banc Hearing) was timely filed and denied on January 2, 1997; the Sixth Circuit's Order denying the petition is reproduced in the Appendix filed herewith at Appendix G ("App. G").

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portions of the First and Fourteenth Amendments to the Constitution are set forth below:

"Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Constitution, Amendment I.

"Nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. Constitution, Amendment XIV, § 1.

STATUTES INVOLVED

The pertinent portion of 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

This dispute arises from the confiscation of petitioner Samantha Sistrunk's political button in a public park during a rally for President George Bush in 1992. The button, which expressed support for candidate Bill Clinton, was confiscated by the private organizer of the rally, the Bush-Quayle '92 General Committee, Inc. (the "Committee"), under authority ceded to it by the City of Strongsville (the "City").

The park, known as the Commons, is a public forum in the center of the City. In 1829, the City's founder, John S. Strong, dedicated the Commons by deed "to the inhabitants of Strongsville" for exclusive use as a public common area. The Commons has since been used for countless public gatherings, festivals, and amusement events, including, for example, the City's "Community Day." The Mayor's office has the authority to regulate use of the Commons.

On October 27, 1992, Mayor Walter Ehrnfelt issued a permit to an entity calling itself the Strongsville Republican Organization to use the Commons for the following purpose: "to receive and welcome President George Bush and celebrate his visit to the City of Strongsville." The permit further provided that the Strongsville Republican Organization was "authorized to further restrict the use of the premises by category of invitation." The Committee joined with the Strongsville Republican Organization to use the permit to hold a rally for President Bush on the Commons. Pursuant to a municipal policy, the City authorized the permit-holders to control public access to the Commons.

The Committee invited the public to attend the rally and enlisted Mayor Ehrnfelt as a co-sponsor. Tickets were made available to the public free of charge at City Hall. The tickets stated: "Mayor Ehrnfelt and the Republican Party invite you to see and hear President George Bush and the Oak Ridge Boys at Strongsville Commons on Wednesday, October 28, 1992." Promotional literature also disseminated at City Hall stated: "Mayor Walter F. Ehrnfelt invites you to come and see . . . President George Bush." Mayor Ehrnfelt and other City officials took part in the rally, appearing on stage alongside President Bush and the Committee's chosen speakers.

The Strongsville public schools promoted the rally and encouraged local students to attend. The high school offered students the option of attending the rally instead of regularly scheduled classes and provided free transportation to the rally on school buses. The high school marching band performed at the event.

Petitioner, a high school student and resident of the City, obtained a ticket to the rally from City Hall. Although she did not support President Bush for re-election, she nevertheless wished to hear him speak, viewing the opportunity to see the President in her hometown as a once in a lifetime event. She was excused from school and taken to the rally by school bus, along with some of her classmates. She wore several buttons on her jacket, including a button endorsing Clinton for president, a Red-Ribbon Drug Free pin, and a button displaying a photograph of a classmate. When petitioner arrived, a Committee official accepted her ticket, but required her to relinquish her Clinton button. Petitioner offered to remove that button and place it in her pocket, but was informed that unless she surrendered it she would not be permitted to

enter the Commons. Petitioner reluctantly complied. The Committee official did not confiscate her other buttons.

After the rally, the City's chief of police acknowledged to the press that the Committee maintained a policy of excluding political signs, and noted that the Committee was authorized to do so because it had "leased" the Commons from the City. A Committee official also acknowledged that the Committee's purpose in adopting this policy was to exclude speech opposing President Bush's re-election.

Petitioner brought this action against the Committee and the City, pursuant to 42 U.S.C. § 1983, to vindicate her right to free speech under the U.S. and Ohio constitutions.[1] The district court found that petitioner "alleged a clear violation of her constitutional right to free speech," but held that petitioner's allegations of state action were insufficient and dismissed petitioner's Section 1983 action as against the Committee. (App. D.) The district court then granted petitioner leave to file an amended complaint. (App. E.) The Committee filed a motion to dismiss the amended complaint, and the City filed a motion for summary judgment, which the district court treated as a motion to dismiss. On December 15, 1994, the district court granted both motions. (App. F.)

Petitioner appealed. On October 29, 1996, a panel of the United States Court of Appeals for the Sixth Circuit -- in a

---

[1]Petitioner's mother initially filed this action on petitioner's behalf. When petitioner reached the age of majority, she was substituted as the plaintiff. Federal jurisdiction in the district court was proper under 28 U.S.C. § 1331 (federal question) and § 1367 (supplemental jurisdiction).

2 to 1 decision -- affirmed the dismissal of petitioner's amended complaint. See 99 F.3d 194 (App. A).

The Sixth Circuit majority concluded that the record was not sufficiently developed to support the district court's dismissal of petitioner's claims on state action grounds and proceeded to address the First Amendment issue. Id. at 198 (App. A-6). The majority focused on Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995). The question in Hurley was whether a state court could apply a public accommodations law to require private individuals who organized a St. Patrick's Day parade in Boston to include in their parade a group of gay and lesbian individuals ("GLIB") imparting a message that the parade organizers did not wish to convey. See id. at 2340-41. This Court held that the state could not require the private parade organizers to allow GLIB to march as "its own parade unit carrying its own banner." Id. at 2347. To do so, this Court found, would violate the parade organizers' First Amendment right to control the message of their own parade. Id. at 2343.

Relying on Hurley, the Sixth Circuit majority concluded that by merely attending the rally as a member of the audience, petitioner was participating in the Committee's speech. 99 F.3d at 200 (App. A-10, A-11). Thus, the majority held that the Committee had a First Amendment right to restrain petitioner's speech (and, necessarily, the speech of every other member of the audience), even to the point of preventing petitioner from displaying a button inconsistent with the "pro-Bush message" that the Committee wanted to convey. Id. at 199 (App. A-9). Judge Spiegel, sitting by designation, dissented. He found Hurley to be "completely inapplicable in this situation" and disagreed with the analogy the majority drew

between marching in a parade and attending a rally. Id. at 201 (App. A-14). As Judge Spiegel explained, "one in attendance at a political rally is merely a spectator," and therefore is not seeking to participate in the organizers' speech. Id.

Petitioner does not dispute the Committee's right to control the content of its own message at the rally. The crucial question here, which Hurley does not answer, is whether the Committee had a right to control the content of the speech of the people who had assembled in a public park to see and hear the rally.

REASONS FOR GRANTING THE WRIT

i. There Is An Urgent Need To Resolve Confusion In The Lower Courts Regarding The Effect Of Hurley On The First Amendment Rights Of Spectators In Traditional Public Forums.

Petitioner tried to wear a Clinton button to a Bush rally in a public park. The Committee, which had been empowered by the City to exclude from the Commons members of the public who sought to express opposition to the re-election of President Bush, confiscated petitioner's button. Because petitioner's expression of political dissent was restrained solely

on the basis of its viewpoint, petitioner sustained a profound injury to her First Amendment rights.[2]

As this Court has held, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145 (1983). See also Mills v. Alabama, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs[,] . . . of course includ[ing] discussions of candidates . . . "). Petitioner's expressive activity is entitled to even greater protection because it occurred in a traditional public forum -- a public park. See Hague v. Committee of International Organizations, 307 U.S. 496, 515 (1939) (streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983) (streets and parks are "quintessential public forums"). Furthermore, "a suburban township may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." U.S. Postal Service v. Council of Greensburgh Civic Ass'ns, 453 U.S. 114, 133 (1981). See also Evans v. Newton, 382 U.S. 296, 302 (1966) ("the public character of this park requires that it be treated as

---

[2]The Committee did not object to petitioner's presence at the rally; she was invited along with the general public, had properly obtained an admission ticket, and was admitted once she relinquished her Clinton button. Nor did the Committee object to the time, place, or manner of her expressive activity; she wore other buttons that were not confiscated.

a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law").

The Sixth Circuit majority justified the restraint of petitioner's expressive activity by relying on Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995). The fundamental holding of Hurley is that a speaker has a First Amendment right not to include another speaker's message as part of its own. But the Sixth Circuit majority extended Hurley far beyond this holding. The Sixth Circuit held that the state may authorize those who organize a public event in a public park to control not only their own expressive activity, but also the expressive activity of spectators who have gathered to watch the event.

The Sixth Circuit majority's view of Hurley conflicts with a recent decision rendered by the D.C. Circuit. In Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997), the D.C. Circuit determined that Hurley does not limit the rights of spectators who seek to peacefully express their dissenting views during a public event in a public forum.

In Mahoney, the plaintiffs sought to express their opposition to the policies of President Clinton by demonstrating on the sidewalks of Pennsylvania Avenue along the route of the 1997 Inaugural Parade. The plaintiffs had obtained the necessary demonstration permits from the National Park Service ("NPS"). But NPS later revoked the plaintiffs' permits, contending that it had already issued permits to itself and another entity for the use of the same sidewalks during the parade. NPS then issued another permit for the use of the same sidewalks to the Presidential Inaugural Committee. NPS told the plaintiffs that they could stand on these sidewalks if they

held signs supportive of President Clinton, but not if their signs were critical of the President's policies. Id. at 1455-56.

The D.C. Circuit found it "difficult to believe that the government was in fact attempting to defend such a blatant discrimination between viewpoints." Id. at 1456. NPS sought to justify its actions by relying upon Hurley for the proposition that an event organizer cannot be compelled to include an unwanted demonstrator in its event. The D.C. Circuit rejected this position, reasoning that *participating* in an event is entirely different from *observing* the event as a spectator while expressing a dissenting view. (This is the very point that distinguishes Hurley from the present case.) The Mahoney Court held:

> Mahoney and his co-plaintiffs do not seek compulsion or even permission to participate in the Inaugural Parade organized by the Inaugural Committees and other supporters of President Clinton. *All they seek is the First Amendment-protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by. Nothing in Hurley says that the organizers of the St. Patrick's Day Parade at issue in that case ever tried to prevent their ideological opponents from doing precisely that.* No case called to our attention says that anyone has ever successfully established the power of a government to so suppress opposing viewpoints; indeed, in few cases has the government of the United States even tried.

Id. at 1456-57 (emphasis added).

As the D.C. Circuit recognized, Hurley does not authorize the government to impose viewpoint-based restraints on the speech of spectators in a traditional public forum. The Sixth Circuit majority below reached the opposite conclusion, reading Hurley to authorize a state actor to restrict the speech of "a member of the audience." 99 F.3d at 199 (App. A-10).[3]

Review by this Court is warranted to resolve these conflicting interpretations of Hurley in the lower courts.

ii. The Sixth Circuit Erroneously Relied On Hurley To Silence A Spectator's Expression of Dissent In A Public Forum.

Neither Hurley nor any other decision of this Court gives a speaker the right to control the content of a *spectator's*

---

[3]In Mahoney, it was the government that sought to restrict the speech of spectators; here, it was a private campaign committee acting pursuant to municipal authority. State action is present in both cases.

The Sixth Circuit majority below concluded that the record in this case was not sufficiently developed to support the district court's dismissal of petitioner's complaint on state action grounds and thus assumed for purposes of its analysis that petitioner had sufficiently alleged state action. 99 F.3d at 198 (App. A-6). Indeed, the amended complaint alleged that the City authorized the Committee to exclude from the Commons members of the public who sought to express opposition to President Bush. See Evans, 382 U.S. at 301-02 (state courts that aid private parties to operate a park on a segregated basis implicate state action). Moreover, a symbiotic relationship existed between the Committee, the City, and the Mayor in sponsoring and organizing the rally. See Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 624 (1991). Hence, the Committee's activities in conducting the rally and excluding petitioner's button "are fairly attributable to the state." Rendell-Baker v. Kohn, 457 U.S. 830, 838 n.6 (1982).

expressive activity in a public forum. Furthermore, while in Hurley the plaintiffs challenged their exclusion from a parade solely as a violation of Massachusetts's public accommodations law, petitioner here has asserted a violation of her First Amendment right to dissent. In Hurley, the Massachusetts law had to yield to the First Amendment rights of the parade organizers, but that result does not compel subordination of petitioner's First Amendment rights to the rights of the Committee.

For these reasons, Hurley's analysis does not provide a complete framework for resolving petitioner's claim. As Judge Spiegel stated in his dissent, the majority "may have turned the narrow holding of Hurley on its head in order to defeat Ms. Sistrunk's First Amendment claim." 99 F.3d at 200 (Spiegel, J., dissenting) (App. A-12).

a. As A Member Of The Audience, Petitioner Did Not Seek To Be Included In, Or To Alter, The Committee's Message.

While the plaintiffs in Hurley sought to march in someone else's parade, petitioner merely tried to observe the Committee's message and express dissent as a member of the audience. This distinction is not a superficial one; it is the difference between altering or distorting the speech of another

(as in Hurley) and expressing an independent and distinct message of dissent (as here).[4]

The Sixth Circuit below concluded that petitioner's political button would have altered the Committee's message, 99 F.3d at 199 (App. A-9), but this conclusion is demonstrably wrong. First, petitioner's button, worn on her clothing, was not affiliated with the rally organizers, their message, or anyone else in the audience.

Second, the Committee's message came from the podium, not the audience. The Committee carefully selected those who were to speak at the rally, including President Bush, Mayor Ehrnfelt, and celebrity Bruce Willis. But the Committee did not select the members of the rally's audience. Instead, hoping to draw the largest crowd possible, the Committee obtained the City's permission to use the Commons and invited the general public to attend.[5]

Third, petitioner did not attempt to speak from the podium or interfere with those who did. She did not seek to drown out the Committee's speakers by expressing her views

---

[4]Indeed, in Hurley, this Court implicitly acknowledged the distinction between those who march in a parade and those who have assembled to watch. This Court stated: "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way . . . ." 115 S. Ct. at 2345.

[5]Similarly, in Hurley, the private parade organizers carefully selected who could march in their parade, but did not select the members of the audience. The organizers rejected GLIB's application to march in the parade, 115 S. Ct. at 2341, but could not have prevented GLIB members from demonstrating on the sidewalks.

through a megaphone. She did not heckle or shout. Petitioner's non-disruptive expressive activity could have peacefully co-existed with the rally organizers' podium, loudspeakers, and banners. See Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987) (describing wearing a T-shirt or button that contains a political message as "nondisruptive" and "protected speech"); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969) (upholding students' First Amendment rights to silently and passively wear armbands in school).

Finally, no reasonable observer would have attributed the message on petitioner's button to the Committee.[6] The Committee's message from the podium was apparent to all: re-elect the President. The opposing, and distinct, message that petitioner wished to express as a member of the audience was equally apparent: elect the President's opponent. No reasonable observer who saw a member of the audience

---

[6]It is appropriate to use a misattribution test here, for a spectator's expressive activity would not alter another's message unless a reasonable observer would view the two expressions as part of a whole. See Hurley, 115 S. Ct. at 2349 ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole"); Capitol Square Rev. & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2458-59 (1995) (Souter, J., concurring) (the test for determining whether the Establishment Clause of the First Amendment is violated is whether religious speech of a private entity displayed on a city's traditional public forum is likely to be attributed to the city by a "reasonable observer").

wearing a Clinton button would think for a moment that the Committee supported its opponent.[7]

What petitioner sought to do here was not alter the Committee's message, but express her own distinct message of opposition. By dissenting, she was exercising the most fundamental of First Amendment rights. See Texas v. Johnson, 491 U.S. 397, 408-09 (1989); Cohen v. California, 403 U.S. 15, 24-25 (1971). See also Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and the First Amendment freedoms"). The Sixth Circuit majority below found a First Amendment value in the elimination of "discordant" views from the Commons. See 99 F.3d at 198, 199 (App. A-7, A-9). But squelching debate is contrary to the broader enduring values of the First Amendment: "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." Cohen, 403 U.S. at 25. See also Mahoney, 105 F. 3d at 1459 ("the government cannot exclude from a public gathering in a public forum . . . those citizens whose views it fears or dislikes or prevent their peaceful expression of those views"). The First Amendment is a shield against the restraint of the free flow of ideas; it should not be used, as it was here, to silence the speech of a dissenter.

---

[7]A reasonable observer of the St. Patrick's Day parade in Hurley, on the other hand, might very well have perceived the presence of a marching GLIB contingent as an endorsement by the parade's organizers of the GLIB members' gay and lesbian lifestyles.

b. The Competing First Amendment Rights Of The Parties Must Be Balanced Against Each Other.

This case raises an important question left open by Hurley: what happens when event organizers and spectators have competing First Amendment rights?[8] The Committee claims it had a First Amendment right to express its pro-Bush message on the Commons pursuant to a municipal permit, and petitioner claims she had a First Amendment right to express (quietly and peacefully) her pro-Clinton message on the Commons as an invited member of the audience. The majority below resolved this conflict by holding that the protection of the Committee's right to free speech required giving the Committee the power to stamp out petitioner's speech altogether.

This Court has held: "[W]e are required to engage in the resolution of conflicting interests under the First Amendment. The constitutional adjudication called for by this task is well within our province." Elrod v. Burns, 427 U.S. 347, 371-72 (1976). When the First Amendment interests of political organizations and private citizens compete, an effort must be made to establish a peaceful co-existence. As this Court stated

---

[8]In Hurley, only the parade organizers advanced a right under the First Amendment; GLIB relied solely on a Massachusetts public accommodations statute. 115 S. Ct. at 2344.

in Elrod when it struck down the political patronage firings of non-policymaking government employees:

> Our decision . . . does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well.

Id. at 372.[9]

The Sixth Circuit majority below made no effort to strike a balance. In fact, the Commons could have accommodated the expressive activities of both the Committee and petitioner. The Committee could have held its rally -- enjoying the benefits of a political rally in a public park

---

[9]This Court has also held in other contexts that competing First Amendment rights must be balanced. See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2386 (1996) ("The First Amendment interests involved are therefore complex, and involve a balance between those interests served by the access requirements themselves . . . and the disadvantage to the First Amendment interests of cable operators and other programmers . . ."); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 822 (1985) (Blackmun, J., dissenting) ("Thus, the fact that the Government 'owns' the property to which a citizen seeks access for expressive activity does not dispose of the First Amendment claim; it requires that we balance the First Amendment interests of those who seek access for expressive activity against the interests of the other users of the property and the interests served by reserving the property for its intended uses").

attended by the general public -- and petitioner could have peacefully attended the rally while wearing a Clinton button on her jacket.

When the Committee invited the public to attend its rally in a public park, it also invited the disparate political opinions the public brought with it. The Constitution gave the Committee a right to express its own views on a traditional public forum, but it did not give the Committee a guarantee that every member of the public invited by the Committee to attend would share those views. The important question raised here is whether the Committee had a constitutional right to use a municipal permit to assert dominion over the content of the speech of spectators whom the Committee had invited to watch its rally in a public park.

iii. The Practice Of Excluding Spectators From Traditional Public Forums Based On Viewpoint Is Widespread And Substantially Certain To Recur.

Private political organizations routinely organize and sponsor political rallies and speeches in connection with the numerous federal, state, and local elections held each election season. These organizations understandably wish to attract crowds in public forums, where citizens have long discussed and debated political matters and politicians have long sought to sway public opinion and garner support.

With the advent of non-stop television news coverage, media relations specialists, and other elements of modern campaigning, the practice of attempting to control the speech of public spectators at such events has emerged. As petitioner

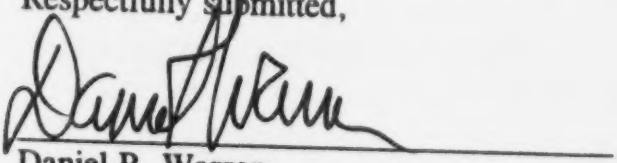
alleged here, the Committee made a practice of excluding opposition viewpoints from the political rallies it organized across the country during the 1992 campaign. No doubt other candidates have had similar policies. And, future candidates, armed with a municipal permit in one hand and the Sixth Circuit's ruling in the other, will feel emboldened to exclude opposing viewpoints on public property with impunity. As evidenced by Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997), the United States government itself attempted to suppress dissenting protesters at President Clinton's recent inauguration festivities.

The ramifications of the Sixth Circuit's opinion are not limited to political rallies and inaugurations. Municipalities and other government entities frequently issue permits to private entities to use public streets, parks, and sidewalks for myriad purposes. If a city may authorize private actors to bar access to parks based on a person's expressive activity or viewpoint, then it may just as easily do so based on that person's race or religion. The extent to which the government can authorize itself or private parties to control access to public property based on the content of speech is a matter of grave constitutional concern.

CONCLUSION

For the reasons stated, petitioner requests that a writ of certiorari be granted to review a ruling of a United States Circuit Court of Appeals that will have a profound impact on the First Amendment rights of citizens to express themselves in public forums.

Respectfully submitted,



Daniel R. Warren,
Counsel of Record
Brian J. Lamb
Nicolle M. Clessuras
Kittie D. Warshawsky
Thompson Hine & Flory LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114-1216
(216) 566-5500

Attorneys for Petitioner
Samantha Sistrunk

No. 95-3067

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA SISTRUNK,
Plaintiff-Appellant,

v.

CITY OF STRONGSVILLE and BUSH-QUAYLE '92 COMMITTEE, INC.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

---

Decided and Filed October 29, 1996

Before: NELSON and RYAN, Circuit Judges; SPIEGEL, District Judge.*

---

*The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

RYAN, J., delivered the opinion of the court, in which NELSON, J., joined. SPIEGEL, D. J. (pp. 12-17), delivered a separate dissenting opinion.

RYAN, Circuit Judge. Plaintiff Samantha Sistrunk appeals the judgment for defendants in this action under 42 U.S.C. § 1983 and Ohio law, challenging the defendants' exclusion of all speech opposing then-President George Bush's reelection at a political rally held on public property. Plaintiff argues that the City of Strongsville, Ohio, violated her free speech rights by permitting the Bush-Quayle '92 Committee to exclude members of the public from a traditional public forum based on the content of their speech. Plaintiff further argues that the committee acted under color of state law or as a state actor when it denied plaintiff access to the Strongsville Commons.

We conclude that neither the city nor the committee violated plaintiff's constitutional rights even if she was excluded from the Commons because of the content of her speech. Because we find that the plaintiff has not alleged a violation of her free speech rights, we have no occasion to address whether her exclusion from the Commons was state action. We therefore affirm the district court's dismissal for failure to state a claim.

I.

The Strongsville Republican Organization obtained a permit from the city to use certain municipal property, including the Strongsville Commons, for a political rally to be held on October 28, 1992, from 8:30 a.m. to 4:30 p.m. According to the complaint, the Strongsville Republican Organization either permitted or joined with the Bush-Quayle '92 Committee to use the Commons to hold a rally for then-President George Bush. Walter Ehrnfelt, the city's mayor, issued the permit to the applicant organization for the nominal fee of $1. The permit provided that the permittee organization would be entitled to use and/or rent designated offices and chambers of the municipal building and its grounds, including the Commons and the gazebo, for the purposes of receiving and

welcoming President Bush and celebrating his visit to the city. The permit specifically provided that the use of the facilities and grounds was limited to the members of the organization and their invitees. The permit also provided that the committee was authorized to further restrict the use of the premises by category of invitation. To attend the rally, members of the public were required to obtain admission tickets, which were available at city hall free of charge on a first come, first served basis.

Plaintiff alleged that the Commons is a public forum, that it is located in the center of the city, that it was dedicated by the city's founder to the inhabitants of Strongsville for exclusive use as a public common area, and that for the last 165 years "countless public gatherings and festivals have been held on the Commons, including community art fairs and amusement and entertainment events, as well as Strongsville's 'Community Day.'" Pursuant to a city ordinance, the mayor's office has the authority to regulate the use of the Commons; any person or organization wishing to use the Commons must apply to the mayor's office for permission.

The committee prohibited rally participants from carrying or displaying signs or buttons that carried messages critical of President Bush; however, it allowed participants to display approved signs and buttons which carried messages either supporting the President or neutral to his support. Plaintiff, a high school student at that time, obtained a ticket to the rally and was transported to the rally on a bus provided by the Strongsville public school system. Plaintiff wore several buttons on her jacket--a picture of a classmate, a red ribbon drug-free pin, and a political button endorsing Bill Clinton for President. Plaintiff was stopped outside the rally entrance by a committee official who told her that she could not carry or display the Bill Clinton button inside the rally. The official did not object to any of the other buttons plaintiff wore. Plaintiff relinquished her Bill Clinton button to the committee official before entering the rally.

When confronted with questions after the rally about the committee's activities in suppressing opposing speech, Strongsville's chief of police was quoted as saying that the committee was entitled to exclude ticket holders from the rally on the basis of speech content because the property had been leased for the day by the committee. Plaintiff claims that this response indicates that the city had knowledge beforehand of the committee's intention to exclude from the Commons political expression that was not supportive of President Bush and that the city had adopted a policy beforehand that caused the deprivation of free speech rights in a public forum.

Plaintiff alleged that a symbiotic relationship existed between the city and the committee, such that the committee's activities in holding the rally can be treated as those of the city itself. In support of this proposition, plaintiff made the following allegations: The city's chief official, Mayor Ehrnfelt, helped organize the rally. The tickets indicated that Mayor Ehrnfelt was a sponsor of the event, stating: "Mayor Walter F. Ehrnfelt and the Republican Party invite you to see and hear President George Bush and the Oakridge Boys at Strongsville Commons Wednesday, October 28, 1992." At the bottom of the tickets appeared the printed statement: "paid for by Bush-Quayle '92 Election Committee, Inc." Among the other political literature disseminated to the public at city hall was an advertisement stating: "Mayor Walter F. Ehrnfelt invites you to come and see . . . President George Bush," below which the advertisement stated: "Send the media a message that we will win!!!" The city openly encouraged citizens to attend the rally and facilitated the distribution of tickets to the public by allowing tickets to be distributed from Strongsville City Hall. Officials of the city, including the mayor himself, actually took part in the rally. The mayor was present on the gazebo on which President Bush and celebrities who publicly endorsed the President's candidacy were seated during the rally. A banner was prominently displayed on the gazebo declaring "Strongsville Trusts George Bush." The Strongsville public schools encouraged local students to attend the rally

by offering students the option of attending the rally instead of their regularly scheduled classes, and by providing students with free transportation to the rally on city school buses. Additionally, the Strongsville High School marching band performed at the rally. Finally, the city provided police protection and other municipal services for the rally.

The district court found that the complaint failed to state a claim against either the city or the committee because the city's involvement in the rally was largely passive and wholly diverse from the committee's actions. The district court therefore concluded that the challenged private conduct was not attributable to the state for the purposes of a 42 U.S.C. § 1983 action. The district court also found that plaintiff had failed to state a claim under the Ohio constitution because the protections provided her under the Ohio constitution extended no farther than the protections accorded her under the First Amendment to the United States Constitution.

II.

Determining whether the district court properly dismissed a claim is a question of law subject to *de novo* review. *See Mertik v. Blalock*, 983 F.2d 1353, 1356 (6th Cir. 1993). In conducting this review, we "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994). A motion to dismiss may be granted under Fed. R. Civ. P. 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

The First Amendment as applied to the states through the Fourteenth Amendment provides that the government "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I

Although, as the dissent observes, we do not ordinarily decide constitutional issues if a case can be resolved on non-constitutional grounds, we think it is appropriate, for two reasons, in this case to proceed directly to the First Amendment issue: 1) as the dissent correctly suggests, the state action question has not been "sufficiently developed" on the record below; and 2) to remand for development of an incompletely presented issue in the hope of finding a non-constitutional basis for deciding this case later on, when we presently confront a clearly framed constitutional question, would seem to be an imprudent waste of time and judicial resources.

Plaintiff argues that the city violated her free speech rights by permitting the committee to exclude members of the public from the rally on the Commons based on the content of their speech. We assume for the purposes of addressing this argument that the plaintiff has alleged sufficient facts to establish at this preliminary stage of the case that the city did authorize the committee to exclude members of the public who sought to express opposition to the reelection of President Bush. Plaintiff argues that the city could not constitutionally authorize a private entity to admit or exclude ticket holders from the rally based on the content of their speech. More specifically, plaintiff argues that 1) the city *did not* convert the Commons to nonpublic status, 2) the city *could not* convert the Commons to nonpublic status, and 3) the viewpoint-based restriction imposed on her speech would be unconstitutional even in a *nonpublic forum*.

Plaintiff claims that Supreme Court precedent establishes that a municipal government does not have the power to convert a traditional public forum into nonpublic property to forbid access to that property for expressive purposes. Plaintiff relies heavily on the fact that the Supreme Court struck down a federal statute that attempted to restrict expressive activity in front of the Supreme Court building by converting a sidewalk, a traditional public forum, into nonpublic government property from which speech could be prohibited entirely. *United States v. Grace*, 461 U.S.

171 (1983). This statute was ruled unconstitutional on the basis that "Congress . . . may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums." *Id.* at 180 (internal quotation marks and citation omitted).

Plaintiff argues that even if the Commons were a nonpublic forum, the city could not authorize a private entity to exclude members of the public on the basis of the content of their speech. The Supreme Court has held that access to a nonpublic forum may be limited by the government only "as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

The law cited by plaintiff may prohibit the City of Strongsville from denying any access to the Commons for expressive activity and from granting or denying permits based on the content of an applicant's speech, but it does not prohibit the city from issuing permits to groups seeking to make exclusive use of the Commons for expressive activity during a limited period of time. In fact, a recent Supreme Court case suggests that the city may not constitutionally require a permittee organization to *include* discordant speakers in its expressive activity.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338 (1995), the Court held that the state could not require private citizens who organized a parade through public streets to include among the marchers a group imparting a message the organizers did not wish to convey. *Id.* at 2340-41. *Hurley* does not control the case before us because, in *Hurley*, (1) only the parade council, not the interposing group, presented the Supreme Court with a First Amendment claim, and (2) the interposing group abandoned its argument that the council's conduct was not purely private but had the character of state action. However, the similarity between the facts in

Hurley and the facts in the present case strongly suggests that the city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey.

In *Hurley*, the South Boston Allied War Veterans Council applied for and received a permit to hold a parade on public streets. A group of gay, lesbian, and bisexual Irish immigrants (GLIB) joined together with other supporters to form a marching unit within that parade. After the council refused to admit GLIB to the upcoming parade, GLIB filed a suit alleging violations of the state and federal constitutions, and of the state's public accommodations law, which prohibited discrimination in public accommodations on account of sexual orientation. GLIB won at the state trial court and appellate court levels, however, the Supreme Court ruled that a state requirement "to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment." *Id.* at 2343.

The *Hurley* Court determined that a parade is intended to make a collective point, and thus is a form of expression, and that GLIB's proposed participation as a unit in the parade was equally expressive. *Id.* at 2345-46. The Supreme Court held that "'[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 2347 (quoting *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 11, 16 (1986) (plurality opinion)). The Court noted that the state generally "may not compel affirmance of a belief with which the speaker disagrees." *Id.* If the rule were otherwise, the government could freely compel "'speakers to propound political messages with which they disagree,'" and "'the government could require speakers to affirm in one breath that which they deny in the next.'" *Id.* at 2348 (quoting *Pacific Gas & Elec. Co.*, 475 U.S. at 16).

The City of Strongsville appropriately granted permission to the committee to engage in expressive activity in the Commons just as Boston appropriately granted permission to the veterans council to engage in expressive activity on the public streets. A public rally is speech to the same extent that a parade is speech. The committee here did not seek merely to assemble and "stand around," any more than the parade organizers sought merely to reach a particular destination. As the *Hurley* Court recognized, the collective point conveyed to the audience is so essential to the parade that "'if a parade or demonstration receives no media coverage, it may as well not have happened.'" *Id.* at 2345 (citation omitted). Similarly, the organizers of the Bush-Quayle rally sought to assemble in order to convey a pro-Bush message to the media by use of pro-Bush speakers and largely pro-Bush attendees. The committee expressly sought to attract attendance in order to "send the media a message" that Bush would win; to convey the message that "Strongsville Trusts George Bush."

Plaintiff has not alleged any content-based exclusion in the permit application process; that is, plaintiff did not allege that she applied for permission to hold a rally for her own expressive purposes in the Commons and was denied permission on the basis of the content of her views. Plaintiff's only claim is that she was not permitted to participate *in the committee's speech* while expressing her own discordant views. To require that the organizers include buttons and signs for Bill Clinton in the demonstration would alter the message the organizers sent to the media and other observers, even if the holders of signs and wearers of buttons did not otherwise interfere with the pro-Bush rally. Just as the organizers of the parade could not be compelled to include in their message the discordant message of GLIB, the committee that organized the rally for George Bush could not be compelled to include in its message an expression of confidence in Clinton.

The plaintiff could have held a pro-Clinton rally on another day just as GLIB could have held its own parade at

another time. The plaintiff could have stood with her button on the sidewalk leading up to the rally to express her support for Clinton, just as GLIB could have lined the streets with other non-participating members of the public to watch the parade and convey from the sidewalks their distinct message. It was suggested at oral argument that the parallel to expressing disapproval of the parade from the sidewalks would be attending the rally as a member of the rally's audience in the Commons. However, participating in the rally as a member of the audience is more akin to marching in the parade itself as one of the less visible marchers. As the parade organizers had received permission to use the streets of Boston, but not the sidewalks, to convey their message, so the rally organizers had received permission to use the Commons, but not the adjacent public sidewalks. Those seeking admission to the area that was covered by the permit--which area was reasonably necessary to the organizers' expressive activity and was restricted to the use of the organizers and their invitees--were in effect seeking inclusion in the expressive activity itself. For the city to require the committee to admit all ticket-holding members of the public seeking to express a message would amount to a rule of law stating that

> any contingent of protected individuals with a message would have the right to participate in [the Committee's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

Hurley, 115 S. Ct. at 2347.

Therefore, we conclude that even if plaintiff has alleged sufficient facts to establish that the city authorized the committee to exclude members of the public who sought to

express a discordant message, plaintiff has not alleged that the city violated plaintiff's free speech rights; rather, plaintiff has only established that the city permitted the committee to exercise its free speech rights and autonomy over the content of its own message. There has been no constitutional violation and therefore there can be no liability on the part of the city or the committee. The district court properly dismissed this action.

III.

For the foregoing reasons, we **AFFIRM** the district court's dismissal for failure to state a claim.

SPIEGEL, District Judge, dissenting. Today, the majority concludes that neither the City of Strongsville nor the Bush-Quayle '94 Committee violated Ms. Sistrunk's constitutional rights. I believe the majority's decision is erroneous. Accordingly, I respectfully dissent.

First, the majority decides an issue that I believe is not before the Court. As a result, the majority unnecessarily resolves a constitutional question when this case was before the Court on the more mundane question of state action. Second, I believe the majority has misapplied the Supreme Court's holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338 (1995). In fact, the majority may have turned the narrow holding of *Hurley* on its head in order to defeat Ms. Sistrunk's First Amendment claim.

The United States Supreme Court generally follows a policy of avoiding unnecessary adjudication of constitutional issues. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)). In *Ashwander*, Justice Brandeis identified numerous doctrines used by the Court to avoid needless adjudication of constitutional questions including standing, mootness and ripeness. For purposes of this appeal, Justice Brandeis' most important admonition was that the "Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring); *see also Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").

The Supreme Court developed the abstention doctrines in order to prevent premature and unnecessary decisions on federal constitutional questions. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501-02 (1941) (requiring courts to withhold decision on the

unconstitutionality of state law until pending proceedings in state court can provide definitive construction of state statutes). The Court stressed that judicial restraint is even more important when a case presents an issue of social or political significance. "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open." *Id.* at 498.

In this instance, the majority fails to follow the Supreme Court's guidance. The issue on appeal is strictly the jurisdictional question whether the conduct in question amounts to state action. A threshold hurdle in any 42 U.S.C. § 1983 action is a showing that the infringement resulted from conduct performed under the "color of state law." *See Hurley*, 115 S. Ct. at 2344 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct' . . . ."). Accordingly, a First Amendment ruling based upon *Hurley* is not only unnecessary, but premature since Ms. Sistrunk does not have a claim if she cannot show state action.

Second, the majority's application of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338 (1995), to this case is improper. In *Hurley*, plaintiffs, gay, lesbian and bisexual Irish-Americans, sought to be included in a parade sponsored by a veterans organization. The veterans argued that the application of Massachusetts' public accommodations law to compel participation by the gays in their parade violated the veterans' freedom of speech. The Supreme Court agreed and found the public accommodations law to be unconstitutional as applied in this context.

Although it recognizes that *Hurley* did not involve a First Amendment claim on the part of the plaintiffs, the majority finds the facts of the two cases so analogous as to "strongly

suggest that the city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey." This analysis is incorrect for several reasons. First, the factual context of the two cases is distinct enough to warrant deeper investigation before blind adherence to the conclusion in *Hurley*. Allowing Ms. Sistrunk to attend the rally with her button does not necessarily mean that she is participating in the rally. Second, the Court in *Hurley* appears to have limited the holding to its context and is completely inapplicable in this situation. Finally, the majority ignores the Supreme Court's and this Circuit's methodology for examining First Amendment claims involving public fora.

Unlike the gay marchers, Ms. Sistrunk did not seek to intrude upon the Committee's speech by participating in the proceedings. Instead, she wished to attend the rally, and at the same time, express her support for Mr. Clinton by wearing a button.

The majority equates Ms. Sistrunk's desire to attend the Bush-Quayle Rally with the gay's wish to march in the St. Patrick's Day Parade. The majority concludes that being a member of the rally's audience is akin to marching in the parade. I disagree. A marcher in the parade is an active participant in the event, while one in attendance at a political rally is merely a spectator. In actuality, marching in a parade is equivalent to speaking at a rally since both are involved in conveying the message.

On the other hand, the folks along a parade route or in a public square during a rally are the audience. The audience comprises those present who can see and hear the event.[1] In fact, both events are pointless without an audience.

---

[1] Audience is a "group of spectators at a public event; listeners or viewers collectively, as in attendance at a theater, concert, or the like . . . ." The Random House Dictionary, unabridged edition (1979).

The majority counters that Ms. Sistrunk "could have stood with her button on the sidewalk leading up to the rally to express her support for [President] Clinton . . . ." Forcing an individual to stand outside the square would be like forbidding the gay Irish-Americans from standing on a street corner along the parade route. It is doubtful that the Supreme Court would find such action acceptable.

In addition to the factual distinctions, *Hurley*'s legal conclusions are also inapplicable in this situation. In *Hurley*, the Court held that First Amendment forbids a State from "compel[ling] affirmance of a belief with which the speaker disagrees." *Hurley*, 115 S. Ct. at 2347. The question here is not whether the City can require action by the Bush-Quayle Committee, but rather, whether granting a private entity the power to exclude citizens from a traditional public forum based upon their viewpoint amounts to state action.

In *Hurley*, the plaintiffs fought exclusion from the St. Patrick's Day Parade as a violation of the Massachusetts public accommodations law. They, however, failed to argue that their First Amendment rights were violated by the exclusion. By contrast, Ms. Sistrunk argues that the First Amendment precludes the City and the Committee from excluding her from a traditional public forum based upon her viewpoint (i.e., wearing a political button). The balance struck in *Hurley* is between a state law and the First Amendment. The Supreme Court had no difficulty finding that the Massachusetts public accommodations law must yield to the First Amendment rights of the Boston Veterans.

The conflict between the First Amendment rights of two individuals, however, is a much different and more difficult inquiry. The Court did not address this issue in *Hurley*. On the other hand, the Court has only upheld viewpoint-based restrictions when the regulation is narrowly tailored to promote a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In a nearly identical factual situation, this Court developed a methodology for confronting the difficult issues presented here. *Bishop v. Reagan-Bush '84*, 1987 U.S. App. LEXIS 6669 (unpublished) (6th Cir. May 22, 1987). Although this case is unpublished, I believe it provides a helpful guidepost and should have been followed in this instance.

In *Bishop*, the plaintiffs attempted to attend a political rally being held on Fountain Square in downtown Cincinnati. They carried signs critical of the Reagan Administration or its policies, but security confiscated the signs before allowing them to enter the square. The district court dismissed all claims finding that the City permit allowed the defendants to take whatever action they desired with Fountain Square. *Bishop v. Reagan-Bush '84 Committee*, 635 F. Supp. 1020 (S.D. Ohio 1986). This Court reversed. The proper inquiry starts with a determination of the type of forum involved. *Bishop*, 1987 U.S. App. 6669, at *6. Then, the trial court must determine if the City has the power to convert it into a private forum. *Id.* at *9. If so, the court must address the questions of state action and qualified immunity. *Id.* Finally, the court must decide if the limitations employed comport with reasonable time, place or manner regulations.

The fundamental question is how much control over a traditional public forum may a municipality cede to a private group. The Supreme Court has expressed a strong desire to protect public fora as an important safeguard of the First Amendment. *See e.g.*, *Perry*, 460 U.S. at 45 ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208, 1216 (N.D. Ohio 1995) ("In essence, public fora serve as bulwarks protecting the right of all persons, especially those who have no access to any other outlet, to speak their minds freely. Courts must not allow the government to overcome the bastions protecting such an important right through so simple an exercise as the granting of a

permit."). The Sixth Circuit noted that there is "the possibility that the nature of certain public forums cannot be altered, either by government fiat or private will." *Bishop*, 1987 U.S. App. 6669, at *6.

In this case, the district court did not determine whether the City had the power to convert a public forum into a private forum through the use of a permit. *Compare Community for Creative Non-violence v. Hodel*, 623 F. Supp. 528 (D.D.C. 1985) (allowing government to convert an otherwise public forum into a non-public forum through the use of a permit) *with Irish Subcommittee v. Rhode Island Heritage Commission*, 646 F. Supp. 347 (D.R.I. 1986) (holding government cannot change the essence of public forum). Instead, the district court determined that no state action existed. The record has not been sufficiently developed on either question. Accordingly, I would reverse and remand this case for further factual development of these issues.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOLORES SISTRUNK ex rel. SAMANTHA SISTRUNK,	)	
Plaintiff,	)	
	)	Case No. 1:94-CV-0764
v.	)	Honorable Ann Aldrich
CITY OF STRONGSVILLE, OHIO, and BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,	)	
Defendants.	)	

ORDER OF DISMISSAL

For the reasons set forth by Defendant Bush-Quayle '92 General Committee, Inc. in support of its motion to dismiss plaintiff's complaint, and having considered plaintiff's response thereto, it is hereby

ORDERED that the motion is GRANTED; and it is

FURTHER ORDERED that the Complaint against Defendant Bush-Quayle '92 General Committee, Inc. be and hereby is DISMISSED with prejudice.

SO ORDERED this 27th day of June, 1994.

/s/
The Honorable Ann Aldrich
United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMANTHA SISTRUNK, by her next friend DOLORES SISTRUNK,	)	Case No. 1:94-CV-0764
Plaintiff,	)	
vs.	)	ORDER
THE CITY OF STRONGSVILLE, OHIO, et al.,	)	
Defendants.	)	

ALDRICH, J.

Samantha Sistrunk moves this Court to vacate its order entered on June 28, 1994, dismissing the Bush-Quayle '92 General Committee, Inc. as a defendant in this action. Upon consideration, this Court finds that its order was improvidently entered.

Accordingly, Sistrunk's motion is granted and this Court's order of June 28, 1994 (doc. #12) is vacated.

IT IS SO ORDERED.

/s/
ANN ALDRICH UNITED
STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOLORES SISTRUNK, as next friend to SAMANTHA SISTRUNK, Plaintiff,	)	Case No. 1:94CV0764
v.	)	MEMORANDUM AND ORDER
THE CITY OF STRONGSVILLE, OHIO, et al., Defendants.	)	

ALDRICH, J.

Dolores Sistrunk filed this suit on behalf of her daughter, Samantha Sistrunk, alleging that the City of Strongsville and the Bush-Quayle '92 General Committee, Inc., acted under color of state law when the Committee confiscated Samantha's Bill Clinton button before allowing her to enter a Bush-Quayle rally, in violation of 42 U.S.C. § 1983. For the reasons enunciated below, the Committee's motion to dismiss the complaint against it for failure to state a claim is granted.

I.

The facts set forth in the complaint are taken as true for purposes of deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

On October 28, 1992, having obtained permission and/or a permit from the city, the Committee held a political rally on the Strongsville Commons in support of the re-election of President George Bush and Vice President Dan Quayle. Although attendance at the rally was permitted to all free of charge, tickets were distributed at Strongsville City Hall before the rally. Students at Strongsville High School were permitted to attend the rally rather than their regularly scheduled classes, and those who chose to attend were transported by school bus to the rally.

Samantha Sistrunk, a Strongsville high school student, chose to attend the rally, and rode there on the bus from the high school. Sistrunk[1] wore a button on her jacket expressing her support for then-candidate Bill Clinton. When she arrived at the rally, one of the Committee's employees explained that she could not enter the rally with her Clinton button. Although Sistrunk offered to place the button out of sight in her pocket, the Committee employee refused to admit her until she surrendered it. Sistrunk relinquished her hold on her Clinton button, and was permitted to enter the rally.

---

[1] The Court hereafter will refer to Samantha Sistrunk as "Sistrunk."

Sistrunk filed suit in this court against the city and the Committee, asserting first, that the city "adopted a municipal policy in violation of § 1983 "[b]y permitting the Committee to use the Strongsville Commons, and by providing municipal services and security for the Committee's rally . . . ." Complaint ¶ 24. Second, Sistrunk contends that the Committee acted under color of State law when it suppressed her free expression of her political opinions. Finally, Sistrunk contends that both defendants violated her free speech rights under the Ohio Constitution. For these injuries, Sistrunk seeks a declaration that the defendants violated her state and federal constitutional rights, unspecified compensatory damages and attorney fees under § 1988.

The city answered Sistrunk's complaint; the Committee has moved to dismiss the complaint as against it.

II.

The standard for this Court's decision on a motion to dismiss under Rule 12(b)(6) is clear. See Fed. R. Civ. P. 12(b)(6) ("Every defense . . . to a claim for relief . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, ...").

> This Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in

support of his claims that would entitle him to relief. A complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." A judge may not grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions.

III.

In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993) (citations omitted). Sistrunk's complaint can be dismissed, then, only if she can prove no set of facts supporting her claims under which she would be entitled to relief.

The Committee's motion to dismiss is based on a single basic contention: that it is not and cannot be shown to have acted as a state actor, such that § 1983 liability could attach to its actions.

Sistrunk's complaint claims violations of 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988) (citations omitted). Sistrunk has alleged a clear violation of her constitutional right to free speech; her allegations of state action in the commission of the violation, however, are insufficient.

> Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. As a general matter the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights."

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (footnote and citations omitted).[2]

---

[2] The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (citation omitted).

Sistrunk contends that the Committee employee who confiscated her political button acted under color of state law, and therefore the Committee is liable to her under § 1983 as a state actor.

> The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

West, 487 U.S. at 49 (citations omitted).

The Sixth Circuit has outlined those situations within which a private person or entity can be considered to be acting under color of state law such that § 1983 liability will attach.

> The principal inquiry in determining whether a private party's actions constitute "state action" under the Fourteenth Amendment is whether the party's actions may be "fairly attributable to the state." The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state in order to hold the defendants liable under section 1983. These tests are: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test.

Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992) (citations omitted). Under each of these tests, the Committee's actions, as alleged in the complaint, cannot be fairly attributed

to the state, and cannot constitute state action for purposes of § 1983.

"The public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state . . . ." Id. The activities commonly found to constitute state action under this test include administering elections and performing all necessary municipal functions in a company town. See Flagg Bros., Inc., v. Brooks, 436 U.S. 149, 158-59 (1978) (citing Terry v. Adams, 345 U.S. 461 (1953), and Marsh v. Alabama, 326 U.S. 501 (1946). Although Sistrunk urges that under this test the Committee was acting under color of state law, she is in error. The Committee held a political rally, which is not a function traditionally reserved to the state. Any traffic control performed by the Committee, which Sistrunk alleges was a public function, was incidental to the political rally, and could not suffice to constitute state action under this test.

"The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state. Wolotsky, 960 F.2d at 1335 (citations omitted). Sistrunk has not alleged, as she must for state action to be found under this test, that the state coerced or directed the actions of the Committee such that those actions can be imputed to the state. Rather, Sistrunk contends that the city "supported and approved of the Committee's actions." Complaint ¶ 18.

"Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) (citations omitted); see also Flagg Bros., 436 U.S. at 164 ("This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State."). Absent at least an allegation of state coercion or control, the Committee's actions cannot be considered state action.

"Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. . . . [It must be demonstrated that the state is intimately involved in the challenged private conduct in order for that conduct to be attributed to the state for purposes of section 1983." Wolotsky, 960 F.2d at 1335 (citations omitted). Although at first blush a finding of state action might seem possible under this test, Sistrunk cannot meet the requirements of this test on the facts alleged in the complaint.

The city's involvement in the larger conduct at issue -- holding the political rally -- appears even from the complaint to have been largely passive and wholly divorced from the Committee's actions. The city allowed the Committee to use the public commons for the rally; the city allowed tickets to the rally to be distributed at City Hall; and the city permitted students to attend the rally. The only affirmative step the city

took to advance the rally, according to the complaint, was that it used public school buses to transport to the rally those high school students who wished to attend. See Complaint ¶ 20. No student was required to attend, nor did the city dissuade any student from attending on the basis of that student's political affiliations. The city's primary involvement here, according to the complaint, was in permitting the Committee to use the Commons. "Contemporary decisions stress the necessity of a close nexus between the state and the challenged conduct rather than application of a mechanistic formula based on business relationships such as the mere leasing of space by the state." Wagner v. Metropolitan Nashville Airport Authority, 772 F.2d 227, 229 (6th Cir. 1985) (citation omitted). A single affirmative step and several instances of passive acquiescence by the local government in relation to the actions of a private party cannot suffice to turn the actions of that private party into state action.

Sistrunk makes much of the fact that the political rally was held at the Strongsville Commons. She contends that because it was held in a public place, the rally was public. Yet she admits in the complaint that tickets were distributed -- presumably without which one could not gain admission to the rally -- and Committee employees controlled the flow of persons into the rally. It is apparent from the face of the complaint that the rally was a private function, even though it was held on public land. Sistrunk's repeated references in her complaint to the rally as a "public rally" are not enough, in light of the facts alleged in that complaint plainly showing it was a private rally.

Sistrunk's attempts to apply to this case the reasoning of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), as well as other similar authority, are misplaced. In Burton, the Supreme Court held that a restaurant located in a parking garage building owned by the state was a state actor for purposes of § 1983 when it discriminated against a potential patron on the basis of his race. As the Supreme Court later acknowledged, there must be some tie greater than mere location between the state and the challenged action of the private actor.

> [In Burton, t]he Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions.

Rendell-Baker v. Kohn, 457 U.S. 830, 842-43 (1982) (citation omitted). Sistrunk has shown no profit or advantage to the city such that the Committee's actions should be attributed to it. Absent such an interrelationship between the Committee's interests and the city's interests, it does not appear that the mere location of the rally in a public place has much significance in the § 1983 context.

Sistrunk's claims against the Committee based on the Ohio Constitution also must be dismissed, because the Committee's actions do not constitute state action.

Sistrunk contends that the Committee and the city violated her rights under Article I, Section 11 of the Ohio Constitution.

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

Id. Under relevant Ohio case law, this provision of the Ohio Constitution is construed and applied in exactly the same way as the free speech right found in the First and through the Fourteenth Amendments to the United States Constitution.

> [W]hile Section 11 has an additional clause not found in the First Amendment, the plain language of this section, when read in its entirety, bans only the passing of a law that would restrain or abridge the liberty of speech. When the First Amendment does not protect speech that infringes on private property rights, Section 11 does not protect that speech either. Zacchini v. Scripps-Howard Broadcasting Co., 54 Ohio St. 2d at 288, 8 O.O.3d at 266, 376 N.E. 2d at 583.

Eastwood Mall, Inc., v. Slanco, 68 Ohio St. 3d 221, 223, 626 N.E.2d 59, 61 (Ohio 1994), petition for cert. filed, Jul. 8, 1994 (No. 94-5316).

The language of the Ohio Constitution prohibits the passage of any law "to restrain or abridge the liberty of speech," but does not prohibit private action inhibiting free speech such as that found here. Sistrunk's protections under the Ohio Constitution extend no farther than the protections accorded her under the First Amendment to the United States Constitution. She therefore cannot recover for a private party's actions in violation of her Ohio constitutional rights any more than she could recover for such a violation of her federal constitutional rights. Because her claim under § 1983 must be dismissed for failure to state a claim upon which relief can be granted, her claim under the Ohio Constitution's free speech section is dismissed, as well.

IV.

Sistrunk's complaint, taken in the light most favorable to her, does not state a claim upon which relief can be granted against the Committee. The Committee was not a state actor, nor was its behavior sufficiently linked to a state interest to make it a state actor for purposes of § 1983. Consequently, the

Committee's motion to dismiss is granted. Sistrunk's complaint is dismissed as to the Committee.

IT IS SO ORDERED.

/s/
ANN ALDRICH
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOLORES SISTRUNK, as next friend to SAMANTHA SISTRUNK,	)	Case No. 1:94CV0764
Plaintiff,	)	
v.	)	MEMORANDUM AND ORDER
THE CITY OF STRONGSVILLE, OHIO, et al.,	)	
Defendants.	)	

ALDRICH, J.

Plaintiff Dolores Sistrunk seeks leave of this Court to amend her complaint in an effort to cure the defects which resulted in the dismissal of her original complaint as against defendant Bush-Quayle '92 General Committee, Inc. (the Committee). The Committee opposes the motion for leave to amend instanter, contending that the proposed amendments would not cure the defects which resulted in the Committee's dismissal. This Court finds that the proposed amended complaint does state a claim against the Committee, and therefore grants the motion for leave to amend instanter.

Federal Rule of Civil Procedure 15(a) provides that in this context, "a party may amend the party's pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires." This Court finds it distressing that Sistrunk did not seek leave to amend her complaint until after this Court had granted the Committee's motion to dismiss her original complaint as against it. Sistrunk could have avoided the effort and expense involved in her response to the motion to dismiss and this Court's ruling on that motion by a timely amendment to her complaint. That said, however, the case law does not explicitly penalize plaintiffs for their failure to amend their complaints prior to the dismissal of those complaints. See, e.g., Foman v. Davis, 371 U.S. 178, 182 (1962) (in the absence of any apparent or declared reason for denying leave to amend the complaint, such leave should be granted freely even after original complaint was dismissed); Network Communications v. Michigan Bell Telephone Co., 906 F.2d 237, 238 (6th Cir. 1990) ("Courts of appeals have uniformly held that an order dismissing a complaint is not a final order when it is possible for a plaintiff to file an amended complaint resurrecting the lawsuit."). Leave to amend a defective complaint, even if already dismissed, therefore should be freely given.

In her amended complaint, Sistrunk makes certain additional allegations concerning the activities of the Mayor of Strongsville, among others, which serve to strengthen the asserted link between the actions of the Committee and the involvement of the City of Strongsville. As a result, the failure of the original complaint to allege a sufficient link between the Committee and the City is cured. Because Sistrunk's amendment will cure the primary defect in her original complaint, and because leave to amend should be

freely given, this Court hereby grants Sistrunk's motion for leave to amend her complaint instanter. The office of the Clerk of Court hereby is directed to file the amended complaint submitted with Sistrunk's motion for leave to amend complaint instanter.

IT IS SO ORDERED.

/s/
ANN ALDRICH
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOLORES SISTRUNK,	)	Case No. 1:94CV0764
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM
	)	AND ORDER
	)	
THE CITY OF STRONGSVILLE, OHIO, et al.,	)	
	)	
	)	
Defendants.	)	

ALDRICH, J.

Delores Sistrunk ex rel. Samantha Sistrunk brings this action pursuant to 42 U.S.C. § 1983 and Ohio law against the City Strongsville and the Bush-Quayle '92 General Committee, Inc. (the "Committee"). This Court has jurisdiction over the federal question, and supplemental jurisdiction over the issues of state law. After this Court dismissed the original complaint as against the Committee, Sistrunk moved to amend her complaint. This Court granted that motion over the Committee's objection, noting that the amended complaint

stated a claim against the Committee. The Committee now moves to dismiss the amended claims against it, and Sistrunk opposes the motion. The city moves for summary judgment, although it does not submit factual materials in support of its motion. Sistrunk opposes this motion as well. For the reasons discussed below, this Court grants the Committee's motion to dismiss despite its earlier ruling on the issue underlying the motion, and, treating the city's motion as a motion to dismiss, grants the city's motion as well.

I.

The facts alleged in the amended complaint follow.

On October 27, 1992, the Strongsville Republican Organization ("SRO"), which is not a party to this action, obtained from the City of Strongsville a permit to use the Strongsville Commons on October 28. The permit provided in part that the SRO would be permitted to rent or use certain public property, including offices and space in the municipal building, the Commons, and the gazebo on the Commons, for the purpose of receiving then President George Bush and celebrating his visit to the city. The permit allowed the SRO to restrict use of the subject property during its effective period "by category of invitation." The SRO, apparently, made the property available to the Committee for purposes of conducting the rally at which the President would speak on October 28.

The Committee invited members of the public to attend the rally. To publicize the event, the Committee distributed

posters which read in pertinent part: "Mayor Walter F. Ehrnfelt invites you to come and see . . . President George Bush . . . Send the media a message that we will win!!!" At the bottom of each poster was the notation: "paid for by the Cuyahoga County Republican Organization." Tickets to the rally, which were free, were distributed at City Hall and read similarly to the posters, with the notation: "Paid for by the Bush-Quayle Election Committee, Inc." Mayor Ehrnfelt, who is not a party to this litigation, participated in the rally and shared space on the podium with the President. Behind the podium was strung a banner which read: "Strongsville Trusts George Bush."

The Strongsville public schools promoted the rally and encouraged students to attend, excusing students' absence from classes to facilitate their attendance. The marching band performed at the rally. The public schools also provided students wishing to attend free public transportation, apparently by school bus, to the rally.

Samantha Sistrunk, a 17 year-old Strongsville public high school student, acquired a ticket to the rally and attended it with classmates. She was transported to the rally by school bus. Sistrunk's jacket bore several buttons of a political nature, one of which expressed her support for then-candidate Bill Clinton's presidential campaign. When Sistrunk approached the gate to the rally, Committee officials informed her that she would not be permitted to take the button into the rally with her. Sistrunk was told that placing the button in her pocket would not be sufficient; to attend the rally, she was

required to surrender her Clinton button. Sistrunk did so and entered the rally.

The Committee maintained a policy through which all rally attenders were required to surrender their political buttons, signs, and other paraphernalia before entering the rally, except that buttons supporting President Bush's campaign were permitted in the rally. Once inside the rally, those attenders who wished to do so were allowed to carry a sign provided by the Committee. All such signs proclaimed support for President Bush's re-election effort. After the rally, the Strongsville chief of police acknowledged that the Committee maintained a policy of excluding political signs, and noted that the Committee was empowered to do so because it had leased the property from the city. A Committee official also acknowledged to the press that the Committee's purpose in adopting this policy was to exclude speech opposing President Bush's re-election.

II.

In deciding a motion to dismiss under Rule 12(b)(6), the Court must take the allegations in the complaint as true and construe those allegations in a light most favorable to the plaintiff. Summit Health, Ltd. v. Pinhas, 111 S.Ct. 1842, 1845 (1991); Dana Corporation v. Blue Cross & Blue Shield, 900 F.2d 882 (6th Cir. 1990); Craighead v. E.F. Hutton & Co., 899 F.2d 485, 489 (6th Cir. 1990). However, the Court need not accept as true a legal conclusion couched as a factual allegation. Papasan v. Allain, 478 U.S. 265, 286 (1986). The

Court is to dismiss the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). When a motion for summary judgment is made without factual submissions, that motion is to be treated as a motion to dismiss or for judgment on the pleadings. Summers v. Dean Control Transportation Co., 518 F.Supp. 864, 865 (S.D. Ohio 1981).

III.

A. This Court, in its Memorandum and Order of August 19, 1994, dismissed the original complaint against the Committee on the ground that the Committee had not acted "under color of state law" in allegedly confiscating Sistrunk's political button. Through the amended complaint, Sistrunk makes essentially the same allegations against the Committee, with certain additions. Specifically, the amended complaint adds the allegations concerning the mayor's involvement in the promotion of and participation in the rally, as well as the allegations concerning statements made by the police chief and a Committee official after the rally. The amended complaint also alleges for the first time that the public schools promoted the rally and that the high school marching band performed at it. Resolution of the Committee's motion, then, turns on whether the addition of these new allegations suffices to allege state action on the part of the Committee.

B. Title 42, U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress (emphasis added).

To state a claim under this statute, a plaintiff must allege, inter alia, action committed by a person acting under color of state law. Memorandum and Order of August 19, 1994, at 4, citing West v. Atkins, 487 U.S. 42, 48 (1988). The ultimate issue in this inquiry is whether the alleged infringement of rights is attributable to the state. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

The Sixth Circuit has identified three tests enunciated by the Supreme Court to be used in determining whether challenged action is state action for purposes of § 1983. Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992). The applicable test here is the "symbiotic relationship" test, also called the "nexus" test. Memorandum and Order, at 6-7. Under the nexus test, "the action of a private party constitutes state action when there is a sufficiently close nexus between the

state and the challenged action." Wolotsky, 960 F.2d at 1335. Thus, "it must be demonstrated that the state is intimately involved in the challenged private conduct in order for that conduct to be attributed to the state for purposes of section 1983." Id.

In applying this test, courts stress "the necessity of a close nexus between the state and the challenged conduct rather than application of a mechanistic formula based on business relationships such as the mere leasing of space by the state." Wagner v. Metropolitan Nashville Airport Authority, 772 F.2d 227, 229 (6th Cir. 1985) (citation omitted). Thus, a public facility, rented to a private actor, is not, merely by virtue of the lease, a public forum while under the control of that private actor. McIntosh v. White, 582 F.2d 1244, 1249 (E.D. Ark. 1984), aff'd in relevant part sub nom. McIntosh v. Arkansas Republican Party-Frank White Election Committee, 766 F.2d 337 (8th Cir. 1985). Only where the state can be shown to profit directly from the private lessor's conduct is a lease arrangement itself evidence of a symbiotic relationship between the state and the private actor. Rendell-Becker, 457 U.S. at 843; see also Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (finding nexus between state and private action where state directly benefitted financially from challenged private action).

Here, Sistrunk alleges that the Committee held the rally pursuant to a permit which granted the committee a lease for this purpose. This alone is no indication that the actions of the Committee in accordance with the lease were attributable to the

city. Nothing suggests, and Sistrunk does not allege, that Strongsville gained revenue from the lease as a result of the Committee's actions in confiscating Sistrunk's political button. Similarly, the fact that the Strongsville chief of police was aware of the Committee's actions and believed that they were allowed under the permit does nothing to demonstrate symbiosis.

Sistrunk points to the Mayor's participation in the Committee's activities as evidence of the city's involvement. However, Sistrunk does not allege that either the city or the Mayor's office took official action to participate in or sponsor the event. Although promotional materials identify "Mayor Ehrnfelt" as a sponsor, those materials do not refer to the Mayor's office or to the City of Strongsville. Nothing in the complaint suggests anything other than that the Mayor made use of his honorific in sponsoring the rally. The fact that a banner at the rally read "Strongsville Trusts George Bush" similarly fails to establish any link between the Committee's actions and Strongsville. Sistrunk does not allege that the city sanctioned the placement of this banner or was in any way connected to it. In a like vein, the fact that the public high school promoted the rally and the marching band performed at it does not indicate that the city took action that was closely linked to the Committee's conduct toward Sistrunk.

This Court has previously noted that the city's involvement in the rally was "largely passive and wholly divorced form the Committee's actions." Memorandum and Order, at 7. In fact, "[t]he only affirmative step the city took

to advance the rally . . . was [to] use[] public school buses to transport to the rally those high school students who wished to attend." Id., at 8. The additional allegations in the First Amended Complaint do nothing to alter this fact. Taking the alleged circumstances as a whole, Sistrunk has failed to allege a symbiotic relationship between any public action and the Committee's confiscation of her Clinton button.

C. In a previous memorandum and order granting Sistrunk's motion to amend the complaint, this Court observed that the amended complaint "does state a claim against the Committee." Memorandum and Order of October 12, 1994, at 1. This pronouncement was made in the context of determining whether Sistrunk's proposed amendments were sufficiently futile to justify denying the motion. To the extent that this Court's previous ruling is inconsistent with that announced here, it was improvidently broad in scope. Simply put, that earlier decision does not control here.

IV.

Whether Sistrunk's claims assert a cause of action against the city also turns on whether she has adequately alleged state action. The conduct of which she complains was the Committee's confiscation of her Clinton button. As discussed above, the Committee, in taking this action, did not take state action. A fortiori, then, the action was not that of the city and cannot be attributed to it. The complaint, therefore, fails to state a claim on which relief can be granted against the city.

V.

"Sistrunk's protections under the Ohio constitution extend no farther than the protections accorded her under the First Amendment to the United States Constitution." Memorandum and Order of August 19, 1994, at 11. Consequently, Sistrunk is no more able to recover for a private party's suppression of her speech under the Ohio constitution than she is under the federal constitution, and she fails to state a claim of an Ohio constitutional violation on the part of either the Committee or the city for which relief can be granted.

VI.

Sistrunk's amended complaint fails to state a cause of action on which relief can be granted. The Committee's motion to dismiss is granted, as is the city's motion for

summary judgment. The complaint is dismissed, and judgment is entered in favor of the defendants.

This order is final and appealable.

IT IS SO ORDERED.

/s/
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOLORES SISTRUNK,	)	Case No. 1:94CV0764
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THE CITY OF STRONGSVILLE, OHIO, et al.,	)	
	)	
	)	
Defendants.	)	**ORDER**
	)	

ALDRICH, J.

The Court has filed its memorandum and order granting defendants' motion to dismiss and motion for summary judgment; therefore,

IT IS ORDERED that defendants' motion to dismiss and motion for summary judgment are granted; final judgment is entered in favor of the defendants; and the case is dismissed.

IT IS FURTHER ORDERED that this judgment is final and appealable.

/s/
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

No. 95-3067

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA SISTRUNK,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	
	)	
CITY OF STRONGSVILLE AND BUSH-QUAYLE '92 COMMITTEE, INC.,	)	
	)	
Defendants-Appellees.	)	**ORDER**
	)	

BEFORE: NELSON and RYAN, Circuit Judges; and SPIEGEL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

---

*Hon. S. Arthur Spiegel, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Spiegel would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 95-3067

SAMANTHA SISTRUNK,

Plaintiff-Appellant,

v.

CITY OF STRONGSVILLE and BUSH-QUAYLE '92 COMMITTEE, INC.,

Defendants-Appellees.

Before: **Nelson** and **Ryan**, Circuit Judges;
Spiegel, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing plaintiff Samantha Sistrunk's complaint for failure to state a claim is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Issued as Mandate: January 10, 1997. A True Copy.

COSTS: None

Filing Fee . . . . . $
Printing . . . . . $

Total . . . . . $

Attest:

/s/
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 1 1997
OFFICE OF THE CLERK

No. 96-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SAMANTHA SISTRUNK,

Petitioner,

v.

CITY OF STRONGSVILLE, OHIO and
THE BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.

BOBBY R. BURCHFIELD*
ALLAN B. MOORE
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044
(202) 662-6000

Attorneys for Respondent, Bush-Quayle '92 General Committee, Inc.

May 1, 1997

* Counsel of Record

15 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly apply this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995), in affirming the dismissal of petitioner's claim that respondent Bush-Quayle '92 General Committee, a private entity, violated her right to free speech by requiring her to relinquish her "Clinton for President" button as a condition of admittance to the Committee's political rally?

RULE 29.6 NOTATION

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 NOTATION ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 4

I. The Court of Appeals Properly Followed *Hurley* 4

II. Petitioner Has Not Alleged and Cannot Allege Legally Sufficient State Action 6

III. There Is No Conflict in the Lower Courts 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Blum v. Yaretsky, 457 U.S. 991 (1982) 7

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 7

Grayned v. City of Rockford, 408 U.S. 104 (1972) . . 4, 6

Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 115 S. Ct. 2338 (1995) . . . . . *passim*

Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) 4, 5

Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997) 4, 7, 8

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 7

Schwitzgebel v. City of Strongsville, No. 1:94-CV-757 (N.D. Ohio Oct. 13, 1994) 2

Schwitzgebel v. City of Strongsville, 97 F.3d 1452 (6th Cir. 1996) 4

Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996) 1, 4

TABLE OF AUTHORITIES—Continued

Page

Statutes

28 U.S.C. § 1254(1) 1, 4

42 U.S.C. § 1983 . . . . . 1, 4

Miscellaneous

Webster's Third New Int'l Dictionary 1878 (1993) 7

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Bush-Quayle '92 General Committee, Inc. ("the Committee") respectfully submits that the Court should deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., A1-A17) is reported at 99 F.3d 194. The relevant orders of the district court (Pet. App., D1-D13; F1-F13) are not reported.

JURISDICTION

The court of appeals entered its judgment on October 29, 1996 (Pet. App., A1). The court of appeals denied a petition for rehearing and rejected a suggestion for rehearing *en banc* on January 2, 1997 (*id.*, G1-G2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

After obtaining a permit from the City of Strongsville, Ohio, respondent Bush-Quayle '92 General Committee, Inc., a "private campaign committee" (Pet., i), held a political rally in the City Commons on October 28, 1992, in support of then-President George Bush's re-election campaign. Pet. App., A2-A3. Petitioner Samantha Sistrunk gained admittance to the rally after voluntarily relinquishing, upon request from a campaign worker tending the gate, her "Clinton for President" button. *Id.*, A3. Although petitioner had never applied for a permit to use the Commons (*id.*, A9), she brought suit under 42 U.S.C. § 1983 alleging that the Committee and the City had violated her First Amendment right to free speech by preventing her from using the rally "to express her support for then-presidential candidate Bill

Clinton." Compl. ¶ 20, 1. Now she seeks a writ of certiorari to the Sixth Circuit, which affirmed the district court's dismissal of her claims.

Petitioner filed her original complaint on April 11, 1994. Based upon the Committee's alleged requirement that she relinquish her Clinton for President button before entering the rally, she alleged that the Committee and, by its acquiescence, the City, had violated her rights to freedom of speech under the United States and Ohio Constitutions. *See id.*, ¶¶ 23-30.

On August 19, 1994, the district court dismissed petitioner's claims against the Committee for insufficient allegations of state action. Pet. App., D1-D13.[1/] One month later, petitioner moved for leave to amend her complaint, and on October 12, 1994, the district court granted that motion. *Id.*, E1-E3. On the following day, however, another judge of the same district court granted a motion by the Committee to dismiss a similar suit against the Committee arising out of the same political rally. *Schwitzgebel v. City of Strongsville*, No. 1:94-CV-757 (N.D. Ohio Oct. 13, 1994) (unpublished). Citing that decision and other authority, the Committee moved on November 1, 1994, to dismiss petitioner's amended complaint on the ground that her new allegations still failed to support a finding of state action by the Committee. Again, the district court agreed, and on December 15, 1994, it granted the Committee's motion to dismiss, as well as a similarly dispositive motion by the City. Pet. App., F1-F11.

[1/] In an apparent clerical error, the district court initially dismissed petitioner's complaint on June 27, 1994, before petitioner had responded to the Committee's motion to dismiss. Pet. App., B1-B2. The district court promptly vacated that order. Pet. App., C1-C2. It then considered petitioner's response and dismissed her complaint again on August 19, 1994. Pet. App., D1-D13.

Petitioner thereafter appealed. During the pendency of her appeal, this Court issued its unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995). The Committee promptly advised the court of appeals of this intervening decision, and it was discussed extensively during oral argument. On October 29, 1996, the court of appeals affirmed the district court's judgment. Pet. App. A1-A17.

Relying on *Hurley*, the court of appeals held that petitioner had failed to allege "a violation of her free speech rights," by either the Committee or the City, even if the Committee had engaged in state action. *Id.*, A2. As a threshold matter, the court noted that First Amendment law "does not prohibit the city from issuing permits to groups seeking to make exclusive use of the Commons for expressive activity during a limited period of time." *Id.*, A7. Further, it explained:

> [Petitioner] has not alleged any content-based exclusion in the permit application process; that is, [petitioner] did not allege that she applied for permission to hold a rally for her own expressive purposes in the Commons and was denied permission on the basis of the content of her views. [Petitioner's] only claim is that she was not permitted to participate *in the Committee's speech* while expressing her own discordant views. To require that the organizers [of the rally] include buttons and signs for Bill Clinton in the demonstration would alter the message the organizers sent to the media and other observers, even if the holders of signs and wearers of buttons did not otherwise interfere with the pro-Bush rally. Just as the organizers of the parade [at issue in *Hurley*] could not be compelled to include in their message the discordant message of [the respondent group in that case], the committee that organized the rally for

> George Bush could not be compelled to include in its message an expression of confidence in Clinton.

Pet. App., A9. The Court thus concluded that the reasoning of *Hurley* defeated petitioner's claim. Senior District Judge Spiegel, sitting by designation, dissented. Pet. App., A12-A17. A petition for rehearing and suggestion of rehearing en banc were denied on January 2, 1997.

Meanwhile, a unanimous panel of the Sixth Circuit affirmed dismissal of the other Section 1983 suit that arose out of the same rally. *Schwitzgebel v. City of Strongsville*, 97 F.3d 1452 (6th Cir. 1996) (*mem.*).

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Properly Followed *Hurley*.

Petitioner has misconstrued the decision below and has framed a question that this case does not present. The court of appeals did not hold and the record does not suggest that the Committee was allowed to "impose a viewpoint-based restraint on . . . peaceful expressive activity . . . in a public park." Pet., i. On the contrary, it held that petitioner, as a participant in the Committee's rally, did not have a right to impose *her* "discordant views" *upon the Committee* within the confines of the Committee's expressive event. Pet. App., A9.

This holding properly follows *Hurley*. In *Hurley*, this Court unanimously held that the First Amendment prohibits the government from compelling the organizers of an expressive event to include within their event opinions with which the organizers disagree. *See* 115 S. Ct. at 2347-51. It is equally true, as the court of appeals held, that the Committee could not be required to include, within its rally for then-President Bush, petitioner's expression of support for

then-Governor Clinton. Pet. App., A7-A11.

Petitioner seeks to avoid this result by arguing that "[n]either *Hurley* nor any other decision of this Court gives a speaker the right to control the content of a *spectator's* expressive activity in a public forum." Pet., 11-12; *see also* Pet. App., A13-A17 (Spiegel, D.J., dissenting) (advancing same argument). Petitioner urges that she "merely tried to observe the Committee's message and *express dissent* as a member of the audience." Pet., 12 (emphasis added). This argument fails for two reasons.

First, petitioner has not alleged a violation of her right to observe; she has alleged a violation of her right to speak. Her petition concedes that "[w]hat petitioner sought to do here was . . . express her own distinct message of opposition." Pet., 15. Her complaint alleges that she "chose to attend" the rally "to express her support for then-presidential candidate Bill Clinton." Compl. ¶¶ 20, 1. She is, after all, alleging that she was deprived of her First Amendment right *to speak*.

Second, petitioner has not alleged that she was denied the right to speak on the sidewalks or streets outside the Committee's rally, or that she was denied a permit to use the public commons on another day. *See* Pet. App., A9-A10 (so noting).[2/] Rather, like the marchers in *Hurley*, her complaint

---

[2/] *Cf. Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 649-56 (1981) (even in public forums, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired;" so long as nothing prevented claimants from conveying their message to the public in the surrounding streets and sidewalks, they could claim no constitutional injury); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) ("two parades cannot march on the same street simultaneously, and government may allow only one").

rests on an asserted right to express her discordant views during the rally as a "rally participant." Am. Compl., ¶¶ 2, 4, 16-18; *see also* Pet. App., A9. As the court of appeals correctly held, *Hurley* rejects petitioner's alleged right to state her opposing views within the Committee's rally. Pet. App., A9 (citing *Hurley*).[3/]

II. Petitioner Has Not Alleged and Cannot Allege Legally Sufficient State Action.

Although allowed to amend her complaint to bolster her allegations of state action, petitioner has failed to make a legally sufficient allegation of that element. This failure is an alternative basis for denying the petition.

Petitioner has conceded throughout this case and in her petition that the Committee is a "private campaign committee." Pet, i. This Court has repeatedly held that allegations of state action will suffice to support a constitutional claim only if the actions of the state are directly responsible for the allegedly wrongful conduct. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (one purpose of the state action requirement is to avoid "'imposing on the State, its agencies or officials, responsibility

---

[3/] Petitioner asserts that "the Committee's message came from the podium, not the audience." Pet., 13. As the court of appeals noted, however, a rally (like a parade) seeks to make a collective point, and the message conveyed by each "rally participant" is part of that collective point. Pet. App., A9. Petitioner's amended complaint implicitly acknowledged this fact. Am. Compl., ¶¶ 16-18. The Committee's "rally" was, in the common usage of that term, an effort to "stir up," to "arouse group enthusiasm," and to "summon for a common purpose" the "supporters or followers" of a "common cause" -- the re-election of George Bush. *Webster's Third New Int'l Dictionary* 1878 (1993) (defining "rally").

for conduct for which they cannot fairly be blamed'") (citation omitted); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (the fact that the state closely regulated, licensed, and provided over 90% of a nursing home's funding did not make the home's actions state action; "[t]he purpose of the [state action] requirement is to assure that constitutional standards are involved only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains") (underlining added). *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982) (same, in the case of a school for troubled children).

Petitioner has never claimed that the *City* caused or was directly responsible for the Committee's alleged violation of her rights: the confiscation of her lapel button. The City's provision of a permit to use the Commons, its transportation of school children to the rally in buses, and the appearance of its mayor at the rally to endorse President Bush's candidacy are all wholly unrelated to the confiscation of petitioner's button.

III. There Is No Conflict in the Lower Courts.

Petitioner asserts that the decision below "conflicts with" the D.C. Circuit's recent decision in *Mahoney v. Babbitt,* 105 F.3d 1452 (D.C. Cir. 1997), and that there is an "urgent need" for guidance from this Court regarding the proper meaning of *Hurley*. Pet., 9, 7. This assertion is not correct.

In *Mahoney*, the D.C. Circuit held that the United States government, acting through the National Park Service ("NPS"), could not base decisions regarding permits to demonstrate along the route of the President's Inaugural Parade on the content of the applicant's speech. 105 F.3d at 1455-60. The D.C. Circuit itself noted that "the *Hurley* decision has little to do with the [*Mahoney*] case." *Id.* at 1456.

Specifically, the D.C. Circuit noted "two distinctions between *Hurley* and [*Mahoney*] which are so critical as to make the cases not remotely parallel.' *Id.* "In the first place, the organizer of the parade in *Hurley*"—like the Committee here—"was a private group exercising its own First Amendment rights." *Id.* By contrast, "in [*Mahoney*], NPS is the government." *Id.* Second, and perhaps more important:

> [T]he Supreme Court's holding in *Hurley* was that the organizers of a parade could not be compelled to include other demonstrators in their event. The protesting demonstrators in *Hurley* sought to compel the private organizers to allow their participation in the parade. Mahoney and his co-plaintiffs do not seek compulsion or even permission to participate in the Inaugural Parade organized by the Inaugural Committees and other supporters of President Clinton. All they seek is the First Amendment-protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by.

Id. Here, like the *Hurley* claimants and unlike the *Mahoney* plaintiffs, petitioner was not content "to stand on the sidewalk" and express her views from that side of the rope. Rather, she seeks the aid of the government, through this Court, to force the Committee to include her speech within the Committee's rally. As shown (pp. 4-6 above), *Hurley* repudiates this claim; the D.C. Circuit's decision in *Mahoney* is not to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Bobby R. Burchfield*
Allan B. Moore
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5000

Attorneys for Respondent Bush-Quayle '92 General Committee, Inc.

*Counsel of Record

Supreme Court, U.S.
FILED
MAY 2 1997
OFFICE OF THE CLERK

No. 96-1562

In The

Supreme Court of the United States

October Term, 1996

SAMANTHA SISTRUNK,

Petitioner,

vs.

CITY OF STRONGSVILLE, OHIO AND THE BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF STRONGSVILLE

JOHN D. RYAN
Law Director
City of Strongsville
18688 Royalton Road
Strongsville, Ohio 44136
(216) 238-5720

JOHN T. McLANDRICH
Counsel of Record
TODD M. RASKIN
MAZANEC, RASKIN
& RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(216) 248-7906

Attorneys for Respondent
City of Strongsville

71110 (800) 3 APPEAL • (800) 5 APPEAL • (900) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

1. Can Petitioner sustain a custom, policy or practice claim against the City of Strongsville in light of *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997)?

2. Is the conduct of the Bush-Quayle Committee at the candidate rally fairly attributable to the City of Strongsville for purposes of Petitioner's First Amendment claim?

3. Do the First Amendment rights of a political party holding a candidate rally by municipal permit on a public commons include the privilege to control the message of the rally by controlling the expressive activity of persons in the permitted areas of the rally, as opposed to persons in areas outside the rally which are occupied by the general public?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
Summary of the Argument	1
Reasons for Denying the Writ	3
I. Can Petitioner Sustain A Custom, Policy Or Practice Claim Against The City Of Strongsville In Light Of *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997)? ..	3
II. Is The Conduct Of The Bush-Quayle Committee At The Candidate Rally Fairly Attributable To The City Of Strongsville For Purposes Of Petitioner's First Amendment Claim?	7
III. Do The First Amendment Rights Of A Political Party Holding A Candidate Rally By Municipal Permit On A Public Commons Include The Privilege To Control The Message Of The Rally By Controlling The Expressive Activity Of Persons In The Permitted Areas Of The Rally, As	

Contents

Page

Opposed To Persons In Areas Outside The Rally Which Are Occupied By The General Public? 12

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Board of the County Commissioners of Bryan County, Oklahoma v. Brown, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997) ..... i, 2, 3, 4, 5, 6

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 9, 10

Citizens to End Animal Suffering v. Faneuil, 745 F. Supp. 65 (District Court of Mass. 1990) 8

Evans v. Newton, 382 U.S. 269 (1966) 8

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, __ U.S. __, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1985) 5, 12, 13, 14, 15, 16

Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1977) 12, 13, 15, 16

Monnell v. Department of Social Services, 436 U.S. 658 (1978) 3

Contents

	Page
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	7
St. Louis v. Praparotnik, 785 U.S. 112 (1987)	10
United States v. National Treasury Employees Union, __ U.S. __, 115 S. Ct. 1003 (1995)	10
Wolotsky v. Huhn, 960 F.2d 1131 (6th Cir. 1992)	7, 8
Statute Cited:	
42 U.S.C. § 1983	7, 8
United States Constitution Cited:	
First Amendment	*passim*
Other Authority Cited:	
Codified Ordinance, Section 1062	3, 4

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the exception that Defendant denies that the Bush-Quayle '92 General Committee, Inc. (hereinafter the "Committee"), "confiscated" the Petitioner's Bill Clinton button "under authority ceded to it by the City of Strongsville" (hereinafter the "City"). Respondent City of Strongsville denies that any such authority was granted or could have been granted by the City of Strongsville to Respondent Bush-Quayle '92 General Committee. The City's conduct included issuance of a permit to use the commons. Respondent City also disagrees with Petitioner's characterization of the scope and reasoning of the Court of Appeals' opinion contained at pages 6 and 7 of Petitioner's Statement of the Case. Petitioner was not merely a member of the "audience," rather she was in the rally proper. The public audience was outside the permitted area.

Petitioner admits she does not dispute the Committee's right to control the content of its own message at the rally. Respondent City of Strongsville does not contend that the Committee has a right to regulate the expressive activity of spectators who assembled in the public park outside the permitted area of the rally.

SUMMARY OF THE ARGUMENT

Petitioner alleges that the Committee violated her First Amendment right by confiscating her Bill Clinton button before letting her into the Bush-Quayle rally. Petitioner alleges the City sanctioned this conduct.

Petitioner, to impose liability on the City of Strongsville, must plead and prove a custom, policy or practice of the municipality which was the moving force behind the violation.

Petitioner does not allege the City directly inflicted the alleged injury. Petitioner must therefore meet the standard of *Board of the County Commissioners v. Brown, supra.* Petitioner's claims and facts do not meet the standard of *Board of Commissioners v. Brown.* The issuing of a permit for the rally and the provision of security are insufficient. Petitioner's allegation of a policy of ceding control over the commons to others is also insufficient under *Board of Commissioners v. Brown, supra.* The City's alleged conduct, even if true, does not satisfy the deliberate indifference to plainly obvious consequence standard.

The City did not sanction this conduct. However, the City asserts the Committee's First Amendment rights allow it to control its expressive message free of interruption, dilution or distortion.

Petitioner's presence in the permitted area of the rally made her a participant in the Committee's expressive conduct. She was not with the audience outside the permitted area. The Committee was entitled to control the expressive message of its rally.

Petitioner was only restricted from the permitted area during the limited time of the rally.

Additionally, the Committee's conduct is not fairly attributable to the City for state action purposes. The City's conduct of issuing a permit and providing security is insufficient to impose liability.

REASONS FOR DENYING THE WRIT

I.

CAN PETITIONER SUSTAIN A CUSTOM, POLICY OR PRACTICE CLAIM AGAINST THE CITY OF STRONGSVILLE IN LIGHT OF *BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA v. BROWN*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997)?

Pursuant to *Monnell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny and especially the Court's most recent ruling in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, __ S. Ct. __, 1997 WL 201995 (1997), Respondent City asserts that Petitioner has failed to allege or prove facts sufficient to demonstrate a custom, policy or practice of the City of Strongsville which is necessary to make the City of Strongsville liable for the alleged constitutional deprivation. Petitioner alleged that the City had a municipal policy of entrusting a private party with power to control access to a public forum for purposes of restricting First Amendment speech. However, the facts alleged by Petitioner, even assuming *arguendo* they were true, are insufficient to support such a policy allegation.

While the Strongsville Codified Ordinances, Section 1062, does grant the mayor authority to issue permits for purposes of use and rental of municipal buildings, the mayor's authority under said section extends to permitting use of the premises on a first come, first serve basis. The grounds for denial of the permit are where the purpose will be illegal or immoral or that the use or occupancy will result in excessive noise, destruction of real or personal property, or otherwise be detrimental to the public health, safety or welfare. Nowhere in Codified Ordinance No. 1062 is the mayor given authority to grant the permit holder

the ability to restrict speech on the public commons. Further, nowhere in the Codified Ordinance is the Mayor allowed to restrict access or rental of the commons on the basis of the content of the speech to be engaged in by the entity seeking use of the commons. Ordinance 1062 does not support Petitioner's argument that the mayor is given authority to allow a private party to restrict speech on the public commons.

Petitioner does not allege the City has a policy which is itself unconstitutional. Petitioner does not allege Ordinance 1062 as written is unconstitutional or sanctions unconstitutional conduct. Petitioner also does not allege an ongoing pattern of conduct sufficient to support a custom, *de facto* policy or practice.

The allegations of fact, evidence and argument submitted by Petitioner demonstrates only a policy of issuing permits to those who seek access to the commons for a legitimate purpose. Such a policy is clearly insufficient to impose liability on the municipality for the allegedly wrongful conduct of the Committee. Such a policy is not a "moving force" behind the violation. Petitioner has alleged no facts, which accepted as true, show the City acted with the "requisite degree of culpability" (deliberate indifference to plainly obvious consequences) or that demonstrates "a direct causal link between the municipal action" (issuing a permit and providing security for the President) and the alleged deprivation (confiscation of the button). *Board of the County Commissioners* at pp. 4-5.

Even assuming *arguendo*, Mayor Ehrnfelt could be a final policy maker for purposes of determining use of and access to the Strongsville Commons, there is absolutely no allegation of fact or evidence that this authority extends to or was utilized to restrict speech or authorize the abridgement of First Amendment rights. Petitioner offered nothing more than conclusory

allegations that the City had a policy of allowing the permit holder to restrict speech during its permitted use of the commons.[1]

Petitioner has not pled or proved facts sufficient to sustain her high burden under *Board of the County Commissioners*. The City issued a permit for use of the commons to the Committee. The city provided safety services. These actions do not in themselves represent a policy in violation of Petitioner's constitutional rights. Neither do these facts, or the use of the mayor's honorific title in the fliers or the school district's allowing children to attend, reflect the required degree of municipal deliberate indifference to "plainly obvious consequences" necessary to impose custom, policy or practice liability on the City. There is no allegation of fact sufficient to show the City disregarded a known or obvious consequence of his action.

The conduct attributed to the City is insufficient under *Board of the County Commissioners* to establish municipal liability. Therefore, the City was properly dismissed and this Honorable Court should deny the Petition.

As noted by this Court in *Board of the County Commissioners*:

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the

---

1. Certainly, under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, __ U.S. __, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1985), the City has no authority to require a permit holder to allow dissenting speech.

> municipality is not held liable solely for the actions of its employees.

Board of the County Commissioners at p. 5.

Rigorous standards of culpability and causation are even more appropriate where liability is sought to be imposed on a municipality for the actions of a private third party, here the Committee. The plaintiff must allege facts sufficient to show deliberate indifference to the plaintiff's constitutional rights. Only where the policymaker's conduct would cause a reasonable policymaker to conclude the plainly obvious consequence of his decision would be a deprivation of a party's constitutional right can the officials conduct rise to the level of deliberate indifference. (*Board of the County Commissioners* at pp. 7-8.) In this case, Petitioner would have to plead and prove that the City was deliberately indifferent to the plainly obvious consequences of issuing the permit and providing security and that one of those plainly obvious consequences would be the deprivation of Petitioner's First Amendment rights by a private third party and that the private conduct would be fairly attributable to the City.

The standard for municipal liability is clear. Petitioner's allegations as to Respondent City are clearly insufficient to meet the standard of deliberate indifference to a plainly obvious consequence.

II.

IS THE CONDUCT OF THE BUSH-QUAYLE COMMITTEE AT THE CANDIDATE RALLY FAIRLY ATTRIBUTABLE TO THE CITY OF STRONGSVILLE FOR PURPOSES OF PETITIONER'S FIRST AMENDMENT CLAIM?

Plaintiff argues that the Committee, as a private entity, was acting under color of law and that their actions can be attributed to the City of Strongsville for purposes of imposing liability on the City of Strongsville. In determining whether the conduct of the Committee is fairly attributable to the state for purposes of 42 U.S.C. § 1983, this Honorable Court has delineated three tests for determining when the challenged conduct may be deemed fairly attributable to the state. These tests are the public function test, the state compulsion test and the symbiotic relationship or nexus test. *Wolotsky v. Huhn*, 960 F.2d 1131 (6th Cir. 1992) at 1335, and authorities collected therein.

Under the public function test, plaintiff must allege and/or prove facts demonstrating the public entity is performing a function which is "traditionally the *exclusive* prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); emphasis in original.

Petitioner erroneously argues that the City of Strongsville allowed the Committee to assume the prerogative of the City to regulate free speech on the public commons. The City does not regulate speech on the commons, rather the City regulates availability of the commons. The authority of the City to regulate the use of the commons, pursuant to statute, was by the permit process. The City did not delegate its authority to issue permits to the Committee.

Clearly, the Committee was not exercising a public function in holding a political rally on the commons.

Petitioner also attempted to argue the symbiotic relationship or nexus test. In order to prevail on the symbiotic relationship or nexus test, Petitioner must demonstrate a sufficiently close nexus between the state and the challenged action so that the action of the private party may be fairly treated as that of the state itself. The Petitioner must demonstrate that the state is "intimately involved" in the challenged private conduct in order for that conduct to be attributable to the state for § 1983 purposes. *Wolotsky, supra*, at 135. The cases relied upon by Plaintiff in the Court of Appeals, *Evans v. Newton*, 382 U.S. 269 (1966) and *Citizens to End Animal Suffering v. Faneuil*, 745 F. Supp. 65 (District Court of Mass. 1990) are clearly distinguishable. In *Evans, supra*, the city, in an effort to avoid the civil rights statute, created the trustees as a straw man in order to exercise a function it would otherwise perform. The Court in *Evans* found that the city's use of the trustees to perform the governmental function of operating and maintaining a public park was still state action. However, in the case at bar, the City of Strongsville did not allow the Committee to operate the commons or control access to it as a general matter. Rather, the City merely granted a permit to the Strongsville Republican Organization for a single afternoon for purposes of conducting the rally.

Likewise, in *Citizens to End Animal Suffering, supra*, the city retained an easement to the lanes between the buildings as public ground. As the property had not been leased to the shopping center, the shopping center was without authority to control conduct of an expressive nature within that property. However, in the case at bar, the property controlled by the Committee was, in fact, lent by permit to the Strongsville Republican Organization. As such, the Committee was within its prerogative to regulate access and conduct on the permitted

premises consistent with its obligations under the law, including the First Amendment.

Most importantly, there is absolutely no allegation of fact or evidence sufficient to establish a reasonable inference that the City of Strongsville knew of, condoned or authorized the Committee's action in the alleged constitutional violation of restricting Petitioner's speech.

Petitioner's reliance on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), is without merit. In *Burton, supra*, this Honorable Court found the state to be intimately involved with the operation of a diner at a state owned parking facility where the state acquiesced over an extended period of time in the violation of the constitutional rights of diners at the restaurant in the parking facility. In the case at bar, there is absolutely no allegation of fact or evidence sufficient to establish a reasonable inference that the City knew or acquiesced in any alleged unconstitutional conduct. Further, the alleged conduct occurred on only one occasion. Even assuming that the conduct could be considered a constitutional violation, one incident of conduct is not enough to impute knowledge to the City such that the City can be deemed to have acquiesced in the course of conduct or to have lent its power or prestige to the conduct. *Burton, supra*, at 862.

In the case at bar, the involvement of the City of Strongsville is limited to the issuance of the permit to the Strongsville Republican Organization. While the City of Strongsville did provide security and crowd control measures, these measures were required for the protection of the President and the attendees at the rally and were not, in any way, nor can they be inferred to be, approval of any alleged restriction on speech by the Committee. The fact that Mayor Ehrnfelt, as a politician, lent his name to the ticket to the rally and to the posters

pronouncing the rally, is clearly not conduct performed in his official capacity or on behalf of the City of Strongsville. The City of Strongsville, as an entity, has no authority to support a particular political party or politician. Petitioner has produced no law, allegations or evidence suggesting that the mayor of the City of Strongsville, as part of his official responsibilities or power, as a matter of state law, has authority to endorse a political candidate or political party. Absent such evidence, Petitioner has failed to satisfy the requirement that the conduct of the alleged decision maker flow from state law authority. *See St. Louis v. Praparotnik*, 785 U.S. 112 (1987). As this Honorable Court has recognized, public employees retain their own First Amendment free speech rights to speak out on public matters. *United States v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003, 1012 (1995). Petitioner's reliance on the use of the mayor's honorific title or the presence of the banner stating "Strongsville Trusts George Bush" is clearly insufficient to rise to the level of joint participation. In fact, Plaintiff cites no case law suggesting that such conduct has ever been held sufficient to rise to the level of joint participation. The fact that the Strongsville City School District, a separate political entity, allowed school children to attend the rally is not evidence of any custom, policy or practice of the City of Strongsville authorizing or condoning an alleged violation of First Amendment rights.

These incidental contacts with the City of Strongsville are insufficient to demonstrate any symbiotic relationship or close nexus between the City and the Committee sufficient to demonstrate that the City has so far insinuated itself with the conduct of the Committee such that the City can be recognized as a joint participant in the challenged activity of the Committee. (*Burton, supra*, at 861-862.)

Petitioner failed to satisfy the requirements for

demonstrating that the Committee acted under color of state law. Petitioner has failed to demonstrate that the Committee performed a traditional public function or that the relationship between the City and the Committee was of sufficient nexus to find the City so far insinuated itself into the conduct of the Committee that the City must be recognized as a joint participant in the challenged conduct. Petitioner has alleged no facts which, if true, would establish City participation in the rally and more importantly, no facts which would demonstrate participation in the decision to ask Petitioner to relinquish her campaign button.

Notwithstanding the Sixth Circuit Court of Appeals' comment that the record was not sufficiently developed to resolve the issue of whether state action was involved in the Committee's private conduct of restricting Petitioner's speech, Respondent City of Strongsville asserts that there was no conduct or nexus between the Committee and the City sufficient to make the conduct of the Committee fairly attributable to the City of Strongsville. Further, and equally importantly, as to Respondent City, there is no custom, policy or practice of the City of Strongsville which was the proximate cause of any alleged constitutional violation.

III.

DO THE FIRST AMENDMENT RIGHTS OF A POLITICAL PARTY HOLDING A CANDIDATE RALLY BY MUNICIPAL PERMIT ON A PUBLIC COMMONS INCLUDE THE PRIVILEGE TO CONTROL THE MESSAGE OF THE RALLY BY CONTROLLING THE EXPRESSIVE ACTIVITY OF PERSONS IN THE PERMITTED AREAS OF THE RALLY, AS OPPOSED TO PERSONS IN AREAS OUTSIDE THE RALLY WHICH ARE OCCUPIED BY THE GENERAL PUBLIC?

While Respondent City was not and is not involved in the First Amendment expressive activity, the City agrees with the Court of Appeals' holding and seeks to support it as an alternative grounds for denying the Petition as to Respondent City.

The lower appellate courts have properly construed and applied *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, __ U.S. __, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1985), in the context of this case and *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1977).

Respondent City of Strongsville asserts that both the Sixth Circuit and the D.C. Circuit properly construed and applied *Hurley, supra*. Petitioner's perceived conflict between the decisions of the Sixth Circuit in this matter and the D.C. Circuit in *Mahoney, supra*, is illusory and results from Petitioner's attempt to avoid the clear implications of *Hurley* and the First Amendment rights of the Committee.

Petitioner attempts to distinguish her case from *Hurley* by arguing that when she entered via ticket the permitted rally area proper that she was not a participant in the rally, but was merely a spectator. By this device, Petitioner attempts to bring herself

within the protections afforded spectators. Petitioner seeks to analogize her attendance at the rally to spectators standing along the sidewalk of the parade route in *Hurley* or in *Mahoney*. However, as found by the Court of Appeals below, Petitioner's participation in the rally proper, by entering the permitted ticketed area of the rally, places her into the Committee's expressive conduct of the rally.

Petitioner's view of the rally and its expressive message is overly narrow. Petitioner seeks to limit the expressive message of the Committee to the speeches from the speaker's podium. However, common sense and the fundamental nature of a rally demonstrate the weakness of Petitioner's argument. The expressive message of a political rally is not the candidates speech in and of itself but is rather the unified expression of support from the rally participants.[2] While the Committee sought to present the largest possible number of persons expressing the message of unified support for the candidacy of George Bush, the Committee in sponsoring the rally was not sponsoring a "debate" which invited a presentation of opposing viewpoints concerning the candidacy of George Bush. To the contrary, the Committee sponsored a political rally whose sole purpose was to put forth the expressive conduct and message of unified support for George Bush.

Petitioner's ability, as in *Hurley* and *Mahoney*, to engage in her dissenting expressive conduct was not restricted beyond her inability to express her message through the permitted medium of the parade or rally. As in *Mahoney* and *Hurley*, Petitioner was entitled to stand on the public sidewalk and express her dissenting message. Unlike *Mahoney*, the Respondent Committee defendants did not seek to prohibit dissenting speech on the adjoining public sidewalks. Rather, the Committee sought

2. Persons supporting an opposing candidate are free to express their dissent, but not at the same time and place.

only to control its own expressive message within the confines of the permitted area.

Petitioner is also incorrect that the suppression of her dissenting speech was viewpoint based. Petitioner's speech was not excluded based on its viewpoint, but was rather excluded because it was not part of the message the Committee chose to express. Where one party is being given access to a locale for an expressive event or is being given access to a medium for an expressive message, the ability to control the content of their message presupposes the restriction of competing interests from expressing their view through that medium or at that locale during the event. These limited restrictions which enable a person or entity to engage in its own expressive conduct free from dilution or distraction does not equal a viewpoint based restriction. Only the limited time, place and manner in which Petitioner sought to express her dissenting view was restricted. Petitioner could have returned to the commons at any other time and have expressed her dissenting speech, Petitioner could have stood on an adjoining sidewalk or anywhere outside the permitted area of the rally and expressed her dissenting speech. Petitioner's speech was not restricted based on viewpoint, but was restricted on time and place.

Petitioner's suggestion that such dissenting speech should be excluded from a speaker's expressive conduct or message only if a reasonable viewer would view it as attributable to the speaker's expressive message is a misapplication of establishment clause case law and is unworkable. To allow a speaker's First Amendment right to be abridged and his message diluted so long as some judicially created reasonable person would not find the extraneous speech attributable to the speaker would do violence to the First Amendment rights of the speaker and would be inconsistent with the very purpose of this Honorable Court's holding in *Hurley*. A speaker's First

Amendment right must clearly extend to the ability to control the content, style and manner of his own expressive conduct without being forced, by a court or state law, to incorporate in unwanted expressive conduct, even if viewed as benign to the content of the speaker's message. Were the rule of law otherwise, the First Amendment would have no meaning. To require a speaker to incorporate unwanted content in his message, so long as that content is benign or viewed as likely to not be attributed to the speaker, would allow for such a wholesale dilution of the speaker's message that he will have no First Amendment right left.

In *Mahoney*, unlike in *Hurley* and *Sistrunk*, the dissenting speaker chose an appropriate place and manner, the public sidewalk beyond the area of the speaker's own expressive conduct. However, where as in *Hurley* and in *Sistrunk*, the dissenting speaker seeks to incorporate their message or make their dissenting speech within the confines of the expressive conduct of the permitted activity, the dissenting speaker goes too far and intrudes on the First Amendment rights of the permitted speaker.

This Honorable Court should not entertain a rule of law which encourages the dilution of the First Amendment rights of person or groups who obtain a permit to use a public commons for an expressive activity. Persons obtaining such a permit should be allowed to hold their event without disruption and dilution from dissenting speech within the confines of the permitted area. If dissenting speakers wish to line the public sidewalks outside the public area, they are free to do so. But, this Court should not allow a rule of law which would allow dissenting speakers to intrude into the permitted area itself and to imbed their dissenting speech within the confines of the permitted area and the expressive conduct of the activity.

The case at bar would more closely resemble *Mahoney* if the Committee sought to ban dissenting speech on the public sidewalks in the areas surrounding the public commons. However, the Committee did not seek to control the speech on the public sidewalks from which Petitioner could have expressed her dissenting speech. To the contrary, Petitioner sought to inject her dissenting speech in the rally itself.

Based on the foregoing, Respondents assert the Court of Appeals properly concluded that pursuant to *Hurley, supra*, the Committee was entitled under the First Amendment to control the expressive activity at its permitted rally. The court properly concluded that the Committee's authority to control its message included the authority to exclude dissenting speech within the confines of the permitted expressive activity.

CONCLUSION

Based on the foregoing, Respondent City of Strongsville asserts the claim is insufficient to meet the deliberate indifference to obvious consequence standard. The Complaint was therefore properly dismissed as to Respondent City.

Additionally, the Committee's conduct is not fairly attributable to the City for state action purposes.

Respondent City of Strongsville further asserts the Committee was entitled to control its own expressive conduct in the permitted rally area. Petitioner was free to make her dissenting expressive speech outside the permitted area. The Committee should not be compelled to accept Petitioner's dissenting speech in the rally proper.

Respondent City of Strongsville respectfully requests this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN T. McLANDRICH
Counsel of Record
TODD M. RASKIN
MAZANEC, RASKIN
& RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(216) 248-7906

JOHN D. RYAN, Law Director
City of Strongsville
18688 Royalton Road
Strongsville, Ohio 44136
(216) 238-5720

Attorneys for Respondent
City of Strongsville

Supreme Court, U.S.
FILED
MAY 13 1997
OFFICE OF THE CLERK

No. 96-1562

In The

Supreme Court of the United States

October Term, 1996

SAMANTHA SISTRUNK,

Petitioner,

vs.

CITY OF STRONGSVILLE, OHIO and THE BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

DANIEL R. WARREN
Counsel of Record
BRIAN J. LAMB
KITTIE D. WARSHAWSKY
THOMPSON HINE & FLORY LLP
Attorneys for Petitioner
3900 Key Center
127 Public Square
Cleveland, OH 44114-1216
(216) 566-5500

71110 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

4 pp

For her reply brief, petitioner Samantha Sistrunk wishes to respond to two points raised in the respondents' briefs in opposition.

The Bush-Quayle '92 General Committee, Inc. (the "Committee") suggests that petitioner had no right to wear her political button to the event because -- as an invited member of the audience at the rally -- "[she] was not content 'to stand on the sidewalk' and express her views from that side of the rope." (Committee Br. in Opp. 8.) This misstates the issue. Petitioner's right to speak does not depend solely upon whether she is standing on one "side of the rope" or the other. Instead, the question is whether petitioner's expressive activity would have altered the content of the Committee's message at the rally by, for example, actively incorporating her speech into the Committee's or by compelling the Committee to affirm a belief with which it disagreed. If the Committee's speech would not have been so altered by petitioner, then the Committee's ability to exercise its right to free speech was not at risk and the constitutional justification for its restraint on petitioner's expressive activity disappears.

Thus, in Hurley v. Irish-American Gay Group of Boston, 115 S. Ct. 2338, 2349 (1995), this Court decided not to require a private parade organizer to include an unwanted participant, only after carefully analyzing how each marcher in a parade affects the overall message of the event. This Court explained:

> Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each

> is understood to contribute something to a common theme, and accordingly there is no customary practice where private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants . . . . [E]ach unit's expression is perceived by spectators as part of the whole.

Id. at 2349. As Hurley suggests, this is not a formalistic exercise: petitioner's First Amendment rights should not turn solely upon where she wished to stand at the rally but on whether her display of a political button would have altered the content of the Committee's message.

Both respondents also contend that this Court should deny certiorari on the ground that petitioner failed to allege state action. Respondents argue state action is lacking here because the conduct of the City of Strongsville ("City") was "wholly unrelated" to the Committee's suppression of petitioner's political speech. (Committee Br. in Opp. at 6-7; City Br. in Opp. at 7-11.) Respondents are incorrect.

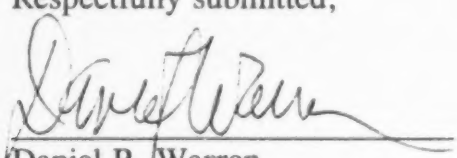
Petitioner's allegations (which the lower courts were bound to construe, under Fed. R. Civ. P. 12(b)(6), in the light most favorable to petitioner) demonstrate that the City, pursuant to municipal policy, authorized the Committee to regulate public access to the Commons based on the content of speech. Moreover, the City's highest officials then joined with the Committee to market the rally to the public as a community event sponsored by the City itself. The City's highest official, Mayor Ehrnfelt, acted as the rally's host. Tickets bearing his name were distributed to citizens from City Hall. The City's public schools bused students to the Commons on City school buses, and permitted them to miss class in order to attend the

rally. Mayor Ehrnfelt appeared on the podium alongside the Committee's chosen speakers under a banner proclaiming: "Strongsville Trusts George Bush." The Committee regulated access to the Commons with the acquiescence of the City's Chief of Police, who later expressly ratified the Committee's suppression of dissent at the rally.

These allegations were the subject of voluminous briefing in the lower courts, and they are more than sufficient to raise the inference that the City itself was a party to the Committee's unconstitutional acts. Petitioner's First Amendment claim is therefore appropriate for adjudication by this Court.

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,



Daniel R. Warren,
Counsel of Record
Brian J. Lamb
Kittie D. Warshawsky
Thompson Hine & Flory LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114-1216
(216) 566-5500

Attorneys for Petitioner